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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 452

GEORGE A. ADAMOS, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1934.

CERTIORARI GRANTED NOVEMBER 12, 1934.

SUPREME COURT OF THE UNITED STATES

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District Court of the United States

WESTERN DISTRICT OF PENNSYLVANIA.

GEORGE A. ADAMOS,
vs.
NEW YORK LIFE INSURANCE CO.

No. 7424 Law.

Docket Entries.

Feb. 3, 1933, Exemplification of record from Court of Common Pleas, Allegheny County filed.

Feb. 15, 1933, On motion of New York Life Insurance Co. defendant, order entered permitting defendant to pay $1184.36 into the registry of this court.

Feb. 15, 1933, Affidavit of defense filed.

Mar. 23, 1933, Reply to new matter and acceptance of service thereon filed.

Mar. 23, 1933, Praecipe for trial list filed.

Apr. 8, 1933, On petition of Geo. A. Adamos, order entered allowing petitioner and J. D. Meyer & A. S. Christner, his attys. to withdraw $1184.36 from the registry of this court less poundage.

Sept. 8, 1933, On petition of New York Life Insurance Co. defendant, order entered granting rule on defendant to show cause why prayer of petition should not be granted and hearing be held in this court for purpose of adjudicating the equitable issue whether the policies of insurance should not be declared void, rule returnable Sept. 18, 1933.

Sept. 18, 1933, Answer of plaintiff to petition for hearing in equity filed.

Sept. 18, 1933, Praecipe for issue filed.

Oct. 16, 1933, On petition of defendant order entered directing that subpoena *duces tecum* issue requiring Dr. B. T. Owens, *et al.* to produce their records pertaining to Andy Adamos.

Oct. 21, 1933, On petition of defendant order entered that subpoena *duces tecum* be issued.

Oct. 21, 1933, Subpoena *duces tecum* issued.

Oct. 23, 1933, Trial without a jury begun.

Oct. 23, 1933, Trial concluded.

Oct. 23, 1933, Trial memorandum filed.

Nov. 3, 1933, Findings of fact, conclusions of law and opinion filed on equitable issue raised under section 274 (B) of the judicial code directing that a decree may be submitted.

Nov. 4, 1933, Decree filed and entered, directing that insurance policies No. 11,773,180, No. 11,773,181, No. 11,780,717 and No. 11,780,718, each in the sum of $5000 are hereby cancelled and rescinded; defendant is discharged from any liability on account of these policies; that plaintiff surrender said policies to defendant; the clerk is directed to pay the sum of $1184.-36 less poundage to plaintiff.

Dec. 16, 1933, Defendant's witness bill filed in the sum of $48.20.

Jan. 30, 1934, On petition of plaintiff order entered granting rule on defendant to show cause why a rehearing should not be granted; returnable forthwith.

Jan. 31, 1934, Hearing on petition for rehearing before Schoonmaker, J.

Feb. 2, 1934, Opinion filed and order entered discharging rule and denying plaintiff's petition for a rehearing.

Feb. 3, 1934, On petition of plaintiff order entered allowing appeal and directing that bond for costs and supersedeas in amount of $200 be given.

Feb. 3, 1934, Assignment of errors filed.

Feb. 3, 1934, Appeal bond approved by court and filed.

Feb. 3, 1934, Citation issued returnable March 7, 1934.

Feb. 26, 1934, Transcript of testimony filed by leave of Court.

Feb. 26, 1934, Stipulation for printing record filed.

Statement of Claim.

(Filed Feb. 3, 1933.)

George A. Adamos, the above named plaintiff, claims of New York Life Insurance Company, the defendant, the sum of Twenty Thousand ($20,000.00) Dollars, with interest thereon from the 1st day of August, 1932, upon a cause of action, of which the following is a statement:

(1) The defendant, New York Life Insurance Company, is a corporation duly organized and incorporated under the laws of the State of New York, having its principal office or place of business in the City of New York, in said State, and has duly qualified under the laws of the State of Pennsylvania, to carry on the business of writing policies of Life Insurance in the Commonwealth of Pennsylvania.

(2) On or about the 8th day of April, 1932, at the City of McKeesport, Pennsylvania, the defendant corporation insured one Andy Adamos by issuing to him its four several policies of life insurance, each for the sum of Five thousand ($5,000.00) Dollars, each having an annual premium of Two hundred eighty-nine and 75/100 ($289.75) Dollars, and the four policies being numbered respectively 11780717, 11780718, 11773180 and 11773181. Full, true and correct copies of each of said policies are hereto attached, made part hereof, and marked respectively Exhibits "A", "B", "C", and "D".

(3) By the terms of said policies so issued by the defendant, the plaintiff herein, George A. Adamos, son of the insured, was designated beneficiary of each of said policies if he survived the insured, which he has done.

(4) That said policies were renewed and were kept alive and in force in the manner provided for therein, from the date of the death of the insured, as herein set forth.

(5) Andy Adamos, the insured in each of said policies, died on the 6th day of July, 1932, at Aliquippa, in Beaver County, Pennsylvania.

(6) The plaintiff herein gave immediate, due and legal notice to the defendant of the death of the insured, and executed the proofs of death upon forms furnished by the defendant corporation, all in accordance with the provisions embodied in said policies, and as required by law.

(7) The plaintiff has made due and legal demand upon said defendant for the amount due under said policies, that is to say, the sum of Twenty-Thousand ($20,000.00) Dollars, together with interest thereon from the 1st day of August, 1932, but the defendant has neglected and refused, and still doth neglect and refuse to pay the amount due, nor has any payment been made on account thereof, although payment has often been demanded.

WHEREFORE, plaintiff brings this suit.

JOHN D. MEYER,
ALAN S. CHRISTNER.
Attys. for Plaintiff.

EXHIBIT "A".

NEW YORK LIFE INSURANCE COMPANY
A MUTUAL COMPANY

Agrees to Pay
to the Executors, Administrators or Assigns of the insured, or to the duly designated ..... Beneficiary
(with right on the part of the Insured to change the Beneficiary in the manner provided herein)
*** FIVE THOUSAND *** Dollars
(The Face of this Policy)
upon receipt of due proof of the death of
*** ANDY ADAMOS *** the Insured.

This contract is made in consideration of the application therefor and of the payment in advance of the sum of $289.75, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Eighth day of April Nineteen Hundred and Thirty-Three, and of a like sum on said date and every Twelve calendar months thereafter during the life of the Insured.

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the Eighth day of April Nineteen Hundred and Thirty-Two, which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Nineteenth day of April Nineteen Hundred and Thirty-Two

THOMAS A. BUCKNER
President

FREDERICK M. JOHNSON
Secretary

.....
Registrar

930-70
O.L.
Age 54
Examined BT SAL
RD

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Annual Participation in Surplus.

OTHER PROVISIONS

AGE.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

PAYMENT OF PREMIUMS.—All premiums are payable on or before their due date at the Home Office of the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Third Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not

maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

INDEBTEDNESS.—Any indebtedness to the Company against this Policy will be deducted in any settlement thereof.

SELF-DESTRUCTION.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

THE CONTRACT.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of the Policy will be required in any settlement thereof.

INCONTESTABILITY.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium.

REGISTER OF CHANGE OF BENEFICIARY

Note.—No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office

Date of Request	Beneficiary	Indorsed by
	Original Policy Endorsed as Follows:	(signed)
July 5th 1932.	George A. Adamos, son.	John C. McCall, Vice-Pres.

Affidavit of Defense.

(Filed Feb. 15, 1933.)

State of New York, }
County of New York. } ss.:

Before me, the undersigned authority, personally appeared JOHN C. MCCALL, who, being by me first duly sworn according to law, deposes and says that he is Vice President of the New York Life Insurance Company, the defendant in the above entitled action and duly authorized to make this affidavit in its behalf; that in so far as the allegations herein contained are made of his own knowledge, they are true and correct, and in so far as they are made upon information received from others, he verily believes them to be true and correct and expects to be able to prove them at the trial of this case; and that the defendant has a full, just and legal defense to the whole of the plaintiff's claim, except as hereinafter stated, the nature and character of which defense is as follows:

1. The averments of fact contained in the first paragraph of the statement of claim are admitted.

2. The averments of the second paragraph of the statement of claim are denied. It is denied that on or about the 8th day of April, 1932, at the City of McKeesport, Pennsylvania, the defendant corporation insured one Andy Adamos by issuing to him its four several policies of life insurance, each for the sum of $5,000. On the contrary, the defendant on April 8, 1932, at New York, New York, issued its two policies No. 11,773,180 and No. 11,773,181 on the life of said Andy Adamos; and on April 19, 1932, the defendant at New York, New York, issued its two policies of insurance No. 11,780,717 and No. 11,780,718 upon the life of said Andy Adamos, each of said four policies being for the sum of $5,000. It is admitted that Exhibits "A", "B", "C" and "D" attached to the statement of claim are true and correct copies of the aforesaid policies.

3. The averments of fact contained in the third paragraph of the statement of claim are admitted.

4. The averments of fact contained in the fourth paragraph of the statement of claim are admitted, with the qualification that said policies were never renewed, only one premium having been paid upon each of them.

5. The averments of fact contained in the fifth paragraph of the statement of claim are admitted.

6. The averments of fact contained in the sixth paragraph of the statement of claim are admitted, with the qualification that the proofs of death were not completely furnished defendant until August 2, 1932.

7. The averments of fact contained in the seventh paragraph of the statement of claim are admitted, with the qualification that neither the sum of $20,000 nor any other sum or sums whatsoever is or are due under said policies, or any of them, and with the further qualification that there has been no neglect on the part of the defendant.

NEW MATTER

8. The application for the aforesaid policies of insurance, which application is made a part of the purported contracts between the parties, provides in part as follows:

> "It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination;"

9. The medical examination for each of said four policies of insurance was on April 6, 1932.

10. Policies No. 11,773,180 and No. 11,773,181 were delivered by the defendant to Andy Adamos on April 15, 1932, and policies No. 11,780,717 and No. 11,780,718 were delivered by the defendant to Andy Adamos on June 16, 1932.

11. The first premium on policies No. 11,773,180 and No. 11,773,181 was paid in full on April 15, 1932, and the first premium on policies No. 11,780,717 and

No. 11,780,718 was paid in full on June 16, 1932. Andy Adamos did not at the time of making application for the policies in suit pay the agent in cash the full amount of the first premium for the insurance applied for, did not declare that he had done so in the application, and did not receive from the agent a receipt therefor on the receipt form attached to the application.

12. Said Andy Adamos, named as the insured in said policies, was also known as Andrew Adams.

13. Between April 6, 1932, and April 15, 1932, said Andy Adamos had consulted and been treated by various physicians, including Dr. B. T. Owens and others. Between April 6, 1932, and June 16, 1932, said Andy Adamos had consulted and been treated by various physicians, including Dr. B. T. Owens, Dr. M. R. Hadley, Dr. Heinz Langer, Dr. C. B. Schildecker and others.

14. In the application for the policies upon which this action is brought, which application is made a part of the purported contracts of insurance, said Andy Adamos on April 6, 1932, was asked the following questions and made the answers thereto set opposite each respectively:

"7. A. Have you ever had any accident or injury or undergone any surgical operation? No.

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? No.

D. Have you ever been found to have a high blood pressure? No.

F. Have you gained or lost in weight in the last year? No.

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

C. The Stomach or Intestines, Liver, Kidneys or Bladder? No.

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

15. In his answers prior to question No. 10 quoted above, said Andy Adamos had mentioned no physician or practitioner whatsoever nor any ailment or disease.

16. Following the aforesaid questions and answers, said Andy Adamos in said application agreed as follows:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

17. On or about June 16, 1932, said Andy Adamos made and signed a supplemental application to the defendant for policy No. 11,780,717 and the same day made and signed another supplemental application to the defendant for policy No. 11,780,718. In each of said supplemental applications said Andy Adamos reiterated and confirmed all the agreements, statements, representations and answers contained in his original application, and agreed that said original application should form a part of said additional insurance contracts, and warranted and declared that no change had occurred in his health or insurability since the date of his said original application, namely, April 6, 1932.

18. In fact, said Andy Adamos prior to April 6, 1932, had suffered an accident and injury, had undergone a surgical operation, had been under observation and treatment in a hospital, had been found to have high blood pressure, had lost weight in the immediately preceding year, had consulted a physician or practitioner for and had suffered from an ailment or disease of the intestines, had consulted a physician or practitioner for an ailment or disease not included in any of his answers to the questions in the application for the insurance in litigation, and had consulted or been examined or treated by various physicians or practitioners within the immediately preceding five years before April 6, 1932. From March 15, 1932, until the time of his death, said Andy Adamos had been under the treatment of Dr. B. T. Owens. From April 21, 1932, until April 29, 1932, said Andy Adamos was under observation in the West Penn Hospital and

Clinic in the City of Pittsburgh, Pennsylvania. While in said West Penn Hospital and Clinic he was examined and treated by Dr. Heinz Langer, Dr. C. B. Schildecker, Dr. C. H. Ketterer, Dr. R. G. Alley and others. On April 18, 1932, said Andy Adamos consulted and was examined by Dr. M. R. Hadley. From February 9, 1932, until February 12, 1932, said Andy Adamos was under observation in the St. Francis Hospital in the City of Pittsburgh, Pennsylvania. While in the St. Francis Hospital said Andy Adamos was examined and treated by Dr. A. P. D'Zmura, Dr. Glenn H. Davison and others. About February, 1932, and in 1931, said Andy Adamos consulted and was examined and treated by Dr. Z. Spanos. From March 14, 1926, until July 8, 1926, said Andy Adamos was confined in the South Side Hospital in the City of Pittsburgh, Pennsylvania. While in the South Side Hospital he was examined and treated by Dr. H. E. McGuire. Said confinement of Andy Adamos in the South Side Hospital was on account of fractures of certain of his lumbar vertebrae, fractures of both of his femurs, a fracture of his left tibia, a fracture at the base of his skull and other injuries sustained by him in an accidental fall on March 14, 1926, while working for the Jones & Laughlin Steel Corporation at Woodlawn (now Aliquippa), Pennsylvania. On account of said injuries, said Andy Adamos underwent a surgical operation by said Dr. H. E. McGuire while in said South Side Hospital. The ailments and diseases from which said Andy Adamos was suffering during at least the last five months of his life and for which he consulted and was examined and treated by the physicians named

above and others, except Dr. H. E. McGuire, included carcinoma of the sigmoid intestinal tract, cancer of the prostate gland and surrounding structures, high blood pressure and others. Within the last year before his death said Andy Adamos had also lost some ten or fifteen or more pounds in weight.

19. Between April 6, 1932, and June 16, 1932, there had been a material change for the worse in the physical condition of said Andy Adamos, but the same was not disclosed by him to the defendant when policies No. 11,780,717 and No. 11,780,718 were delivered to him on the last mentioned date, nor at any other time.

20. In his application for the aforesaid insurance said Andy Adamos represented that he had been born on August 3, 1878, and that his age reckoning from his nearest birthday was 54 at the time of making said application on April 6, 1932. In fact, at that time Andy Adamos was 61 years of age.

21. Said Andy Adamos when he made the aforesaid answers and declarations knew that they were false; that he had consulted and been examined and treated by physicians and practitioners; that he had ailments and diseases; that he had sustained an accident and injuries; that he had undergone a surgical operation; that he had been under observation and treatment in hospitals; that he had lost weight; and that there had been a change for the worse in his physical condition between April 6, 1932, and June 16, 1932; all as set forth hereinabove. He also knew that his said answers and declarations were material to

the risk. Said Andy Adamos made said answers and declarations fraudulently with the intent of deceiving the defendant into issuing to him the policies of insurance in litigation, when the facts were such that if he had answered said questions truthfully and had made a full and honest disclosure, the defendant would not have issued any of said policies, but would have declined his application.

22. The aforesaid answers and declarations of said Andy Adamos were material to the risk, were relied upon by the defendant in determining whether to grant said insurance, and but for those false and fraudulent answers and declarations defendant would not have issued any of said policies of insurance. The defendant had no knowledge of the falsity of said answers and declarations until after the death of said Andy Adamos, when it was put upon inquiry.

23. On August 18, 1932, the defendant disavowed liability under any and all of said policies of insurance and elected to rescind the contracts evidenced by said policies, and notified the plaintiff of its disavowal of liability and rescission and that the insurance never took effect, and tendered to the plaintiff the sum of $1,184.36, being the total amount of premiums received by the defendant upon said policies, with interest thereon from the date of receipt to the date of said tender, and offered to do whatever else, if anything, it ought to do in the premises, and has always since kept said tender and offer good.

24. The defendant herewith tenders judgment in the sum of $1,184.36, being the amount of premiums

received by it under said policies, with interest thereon from the date of receipt to the date of the aforesaid tender.

25. By way of equitable relief, the defendant hereby respectfully prays that each of said four policies of insurance be surrendered, cancelled and rescinded.

WHEREFORE it is denied that the defendant is indebted to the plaintiff in the sum of $20,000, with interest thereon from August 1, 1932, or in any other sum or sums whatsoever, except the sum of $1,184.36, for which judgment is herein tendered and which will be paid into the Registry of this Court simultaneously with the filing of this affidavit of defense.

JOHN C. McCALL.

Sworn to and subscribed before me this 7th day of February, 1933.

GEORGE J. WIRTENSON, JR.,
(SEAL) *Notary Public, Queens County.*

Queens County Clerk's No. 3301
Queens County Register's No. 3457
Certificates filed in New York County
New York County Clerk's No. 724
New York County Register's No. 4W446
My commission expires March 30, 1934.

Reply to New Matter.

(Filed March 23, 1933.)

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared GEORGE A. ADAMOS, the above named plaintiff, who, being duly sworn according to law, doth depose and say that he has a full, just and true defense to the New Matter alleged in the Affidavit of Defense, heretofore filed, as follows:

(8) The averments of fact contained in the eighth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are admitted with the qualification that the insured did not know and was not informed of this provision of the policy.

(9) The averments of fact contained in the ninth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied except as to policy No. 11,773,180, and as to this policy it is admitted that the medical examination was on April 6th, 1932.

(10) The averments of fact contained in the tenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied and plaintiff is informed, believes and therefore alleges that the policies Nos. 11,773,180 and 11,773,181 were delivered by the defendant to Andy Adamos on April 8th, 1932, and policies Nos. 11,780,717 and 11,780,718 were delivered by the defendant to Andy Adamos on April 19th, 1932.

(11) The averments of fact contained in the eleventh paragraph of the defendant's Affidavit of Defense,

entitled "New Matter", are denied and plaintiff is informed, believes and therefore alleges that the first premium on policies Nos. 11,773,180 and 11,773,181 were paid, in full, on April 6th, 1932, and the first premiums on policies Nos. 11,780,717 and 11,780,718 were paid, in full, on April 19th, 1932, and that at the time of making the application the premiums were paid in cash.

(12) The averments of fact contained in the twelfth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are admitted.

(13) The averments of fact contained in the thirteenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied, and plaintiff is informed, believes and therefore alleges that the insured, Andy Adamos, was not treated by Dr. B. T. Owens and others between April 6th and April 15th, 1932, or between April 6th and June 16th, 1932, and that the insured, Andy Adamos, did consult and was treated by Drs. M. R. Hadley, Heinz Langer, and C. B. Schildecker and others between April 6th and June 16th, 1932, and was informed by said doctors that he was being treated for a slight disorder of the stomach caused by overeating.

(14) As to the averments in paragraph fourteenth of defendant's Affidavit of Defense, entitled "New Matter", plaintiff admits that the questions set forth in said paragraph appear in the application for the policies dated April 6th, 1932. Plaintiff further avers that the said Andy Adamos was an ignorant, illiterate and uneducated person who was born in the

kingdom of Greece, and lived there until he was between fifteen and twenty years of age when he migrated to America; that the said Andy Adamos, after coming to America, engaged in businesses and occupations which threw him in contact principally with other men and women who spoke the Greek language; that the said Andy Adamos attended no school and received no instruction in writing or reading the English language; that on the 6th day of April, 1932, he was able to speak the English language very poorly and to understand only the most ordinary words of the English language, and then only when those words were spoken to him very distinctly, slowly and clearly so as to be able to understand them; that on the 6th day of April, 1932, when he went to the office of Dr. J. C. Wiley for physical examination by the said Dr. Wiley, he was not accompanied by an interpreter who could interpret the Greek and the English languages, and that the said Dr. Wiley could not and did not converse with or interrogate the said Andy Adamos in the Greek language; that the answers given by the said Andy Adamos to such of these questions as he did understand are not copied correctly on said application for the reason that the interrogator of the said Andy Adamos did not understand the answers given by the said Andy Adamos; that the said Dr. Wiley in reading said questions to the said Andy Adamos in the English language did not explain them in such a manner that the said Andy Adamos could or did understand them, or in such a manner that the said Andy Adamos could or did knowingly and intelligently answer such questions; that the said Dr. Wiley well knew when reading the said

questions to the said Andy Adamos that the said Andy Adamos did not understand them or any of them and well knew that the said Andy Adamos could not and did not make intelligent and understanding answers to the said questions then and there propounded to him.

(15) The fifteenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", is indefinite and inexact. If it is intended to be a statement that the said Andy Adamos, in making oral answer to questions prior to number ten, had mentioned no physician or practitioner whatsoever nor any ailment or disease, then plaintiff denies the averments of said paragraph. If said paragraph as it appears in said Affidavit of Defense refers to the answers written down by the physician on the application, then plaintiff admits the allegations of this paragraph to be true. All questions asked of the plaintiff by said physician and all answers thereto are explained in detail in paragraph fourteen hereof, which, by reference thereto, is made a part of this reply to the allegations of the fifteenth paragraph of New Matter.

(16) The allegations of the sixteenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied as stated. It is admitted that in the printed form of application the paragraph quoted in the sixteenth paragraph of the Statement of Claim appears but it is denied that Andy Adamos agreed thereto. As stated in answer to the fourteenth paragraph of the New Matter, hereinabove, Andy Adamos was illiterate and unlearned, could not read the paragraph quoted from the application in English, and did

not have it translated to him in Greek at the time he signed, but trusted himself entirely to the agent of the defendant and signed whatever papers he was told to sign at the places indicated by said agent, and at the time of signing of said paper no explanation was made to the said Andy Adamos of any of the parts of said application in his native tongue, nor was any attempt made in English to have him understand the various details of said application or the matters and things appearing therein, he being assured by the agent of the defendant, at the time of the signing of said application, that he was bound only to pay the annual premium demanded by said company and that upon payment thereof his life would be insured for the amount appearing in said application.

(17) The averments of fact stated in the seventeenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied, but on the contrary plaintiff is informed, believes and therefor alleges that Andy Adamos made and signed the supplemental application for policies Nos. 11,780,717 and 11,780,718 on April 19th, 1932.

(18) As to the averments of fact stated in the eighteenth paragraph of defendant's Affidavit of Defense, entitled "New Matter", the plaintiff admits that the insured, prior to April 6th, 1932, had suffered an accident and injury and had undergone a surgical operation, but avers that said operation occurred prior to the period required to be answered by the insured, as stated in question eleven of the application for insurance which says,

"11. What physician or practitioner, if any, not named above, have you consulted or been examined or treated by within the past five years?" said injury and surgical operation and treatment having been between March 14th, 1926 and July 8th, 1926, being more than five years prior to the time of this application. Plaintiff admits that the said Andy Adamos had undergone observation in a hospital, but denies that Andy Adamos had undergone treatment in a hospital or that the said Andy Adamos knew that he had high blood pressure and denies that he had lost weight in the immediate preceding year. Plaintiff denies that the said Andy Adamos had consulted a physician or practitioner for and had suffered from an ailment or disease of the intestines. Plaintiff denies that the said Andy Adamos had consulted a physician or practitioner for ailment or disease not included in any of his answers to the questions in the application for insurance in litigation, but avers that all questions asked by the physician, Dr. Wiley, and answers stated in the application are explained in detail in paragraphs fourteen and sixteen herein, which, by reference thereto, are made part of this reply to the allegations in the eighteenth paragraph of New Matter. Plaintiff denies that the said Andy Adamos had been treated by all the various physicians or practitioners within the immediately preceding five years before April 6th, 1932, but admits that he had consulted physicians and practitioners within the said period. Plaintiff denies that from March 15th, 1932, until the time of his death, the said Andy Adamos had been under treatment by Dr. B. T. Owens but avers that the insured did consult the

said doctor a few times prior to the few days immediately preceding his death, and was informed that he had a slight disorder of the stomach caused by overeating. Plaintiff admits that the said Andy Adamos was under observation in the West Penn Hospital and clinic in the City of Pittsburgh, and was examined by the said doctors, and plaintiff admits that the said Andy Adamos was treated by the said physicians for slight disorder of the stomach as said doctors informed the said Andy Adamos. Plaintiff admits that said Andy Adamos consulted Dr. M. R. Hadley and admits that he was treated by the said physician for a slight disorder of the stomach. Plaintiff admits that the said Andy Adamos was under observation in the St. Francis Hospital and examined by the said doctors, and plaintiff admits that the said Andy Adamos was treated by the said physicians or practitioners for a slight disorder of the stomach as said doctors informed the said Andy Adamos. Plaintiff admits that the said Andy Adamos consulted and was examined by the said Dr. Spanos and admits he was treated by the said physician for slight disorder of the stomach. Plaintiff admits the said Andy Adamos was confined in the South Side Hospital from March 14th, 1926 to July 8th, 1926, and was treated by Dr. H. E. McGuire; that he was confined on account of various fractures mentioned in said paragraph; that said injuries sustained were due to an accidental fall on March 14th, 1926, while working for Jones and Laughlin; that the said Andy Adamos underwent a surgical operation; and further avers that the said operation occurred prior to the period required to be answered by the insured, as stated in

question eleven of the application quoted above in this paragraph, said operation having occurred more than five years prior to this application; and further avers that this injury and operation is not material to this case. If the ailments and diseases from which said Andy Adamos was suffering, as mentioned in said paragraph, including carcinoma of the sigmoid intestinal tract, cancer of the prostate gland and surrounding structures, and high blood pressure is a statement of the diseases in his body as discovered by the physicians, then this is admitted, but if it is meant to be a statement of the diseases that the said Andy Adamos knew he was suffering from and had been treated for by physicians, then plaintiff denies the same, and is informed, believes and therefore alleges that the said Andy Adamos did not, at any time, know that he was suffering from any of the diseases mentioned in the aforesaid paragraph and that he did not consult, nor was he treated by, the physicians named in said paragraph for the diseases mentioned, nor was he told by any physician at any time that he was suffering from the said diseases. Plaintiff denies that the last year before the death of the said Andy Adamos that he had lost some ten or fifteen pounds in weight, but avers that the said Andy Adamos was in apparent good physical condition and believed himself to be in good physical condition to within a few days of his death.

(19) The averments of fact stated in the nineteenth paragraph of the defendant's Affidavit of Defense, entitled "New Matter", are denied, and plaintiff avers that Andy Adamos appeared to be in very

good physical condition and that he was not bound to disclose anything to the company as to policies Nos. 11,780,717 and 11,780,718, for the reason that there was not a material change for the worse in his physical condition between April 6th, 1932 and June 16th, 1932.

(20) The averments of fact stated in the twentieth paragraph of defendant's Affidavit of Defense, entitled "New Matter", are denied and plaintiff avers that the said Andy Adamos was born on August 3rd, 1878, and that his age reckoning from his nearest birthday was fifty-four, at the time of making said application on April 6th, 1932.

(21) The averments of fact and intention on the part of Andy Adamos, as stated in paragraph twenty-one of defendant's Affidavit of Defense, entitled "New Matter", are denied as stated. As to the answers and declarations stated in the application, the plaintiff avers that said answers and declarations are explained in detail in paragraphs fourteen and sixteen herein which, by reference thereto, are made part of this reply to the allegations in the twenty-first paragraph of New Matter. As to the statement that Andy Adamos knew that he had consulted and been examined and treated by physicians and practitioners, plaintiff admits that the said Andy Adamos knew that he had consulted and been examined by physicians and practitioners, and admits that Andy Adamos knew that he had been treated by some of them for slight disorder of the stomach, as he was informed by said doctors. Plaintiff denies that the said Andy Adamos knew that he had ailments and diseases, but is informed, believes

and therefore alleges that the said Andy Adamos did not, at any time, know of any latent disease existing in his body, nor was he told by anyone or any physician at any time of any latent disease existing in his body. Plaintiff admits that the said Andy Adamos knew he had suffered an accident and injury and that he had undergone a surgical operation, and further avers that said information known to Andy Adamos became knowledge prior to the period required to be answered by the said Andy Adamos, said explanation being stated more in detail in paragraph eighteen hereof which, by reference hereto is made part of this reply to the twenty-first paragraph of New Matter. Plaintiff admits that the said Andy Adamos knew that he had undergone observation in a hospital but avers that said observation and treatment was for a slight disorder of the stomach as he was informed by said doctors. Plaintiff denies that the said Andy Adamos had lost weight or that his physical condition between April 6th and June 16th, 1932, had changed for the worse, but is informed, believes and therefore alleges that the said Andy Adamos appeared to be in the best physical condition to within a few days before his death, and that the said Andy Adamos believed that he was in a good physical condition up to the time he died and at his death he was as yet not informed of any disease existing in his body. Plaintiff denies that the said Andy Adamos knew his answers and declarations were material to his risk but is informed, believes and therefor alleges that the said Andy Adamos thought he only had to pay money and that he would receive insurance in return, and that the said Andy Adamos signed all

papers given to him by the agent, having expressed confidence in said agent that he would receive insurance on paying the premium. Plaintiff denies that the said Andy Adamos made said answers and declarations fraudulently with the intent to deceive the defendant into issuing to him the insurance policies, but plaintiff is informed, believes and therefor alleges that said answers and questions were truthfully given, as explained in paragraphs fourteen and sixteen hereof, which, by reference thereto, is made part of this reply to the allegations in the twenty-first paragraph of New Matter, and plaintiff further avers that the defendant company issued said policies only after the company had made a full and complete investigation of the physical and financial condition of said Andy Adamos and only after being satisfied of such did they issue the aforesaid four policies in litigation.

(22) The averments of fact stated in the twenty-second paragraph of defendant's Affidavit of Defense, entitled "New Matter", are denied, and plaintiff is informed, believes and therefor alleges that the said defendant company made a full, correct and complete investigation of both the physical and financial condition of the said Andy Adamos and only after being satisfied from the investigation conducted, and not relying on the answers and declaration as being material to the risk, did they then issue the aforesaid four policies in litigation. Plaintiff denies that said answers and questions were false or fraudulent or that the defendant had no knowledge of the falsity of said answers and declarations until after the death of the said

Andy Adamos, but avers that said questions and answers are explained in detail in paragraphs fourteen and sixteen herein which, by reference thereto, are made part of this reply to the allegations in the twenty-second paragraph of New Matter.

(23) Plaintiff is informed, believes and therefor alleges that the averments of fact stated in paragraphs twenty-three, twenty-four and twenty-five of defendant's Affidavit of Defense, entitled "New Matter", do not contain any new matter and, therefore, do not require any answer.

Wherefore, plaintiff is entitled to judgment for the amount of the claim.

GEORGE A. ADAMOS.

Sworn to and subscribed before me this 22nd day of March, A. D. 1933.

LEO J. AARON,
(SEAL) *Notary Public.*
My Commission Expires March 2, 1937.

Petition for Hearing in Equity.

(Filed Sept. 8, 1933.)

To the Honorable, the Judges of said Court:

The petition of New York Life Insurance Company respectfully represents:

1. The above entitled action is in assumpsit at law upon four life insurance policies.

2. In defense to said action the petitioner has set up in its affidavit of defense that all of said four poli-

cies of insurance were procured from it by materially false representations by the insured regarding his prior state of health, treatment by physicians and other material matters, and concealment of a material change in his physical condition between his medical examination and delivery of two of the policies. The affidavit of defense also prays by way of equitable relief that each of said four policies of insurance be surrendered, cancelled and rescinded.

3. By the plaintiff's replication an issue is raised as to the fraudulent misrepresentation and concealment averred in the affidavit of defense.

4. An equitable issue is raised by the defendant's affidavit of defense and the plaintiff's reply which should be adjudicated by a chancellor according to equity procedure without a jury and preferably in advance of any jury trial at law.

WHEREFORE the defendant prays that said equitable issue be heard pursuant to Section 274 (b) of the Judicial Code (28 U. S. C. A. 398) by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues.

NEW YORK LIFE INSURANCE COMPANY,
By SMITH, BUCHANAN, SCOTT & GORDON,
Its Attorneys.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared WILLIAM H. ECKERT, who, being by me first

duly sworn according to law, deposes and says that the averments of fact contained in the foregoing petition are true and correct.

WILLIAM H. ECKERT.

Sworn to and subscribed before me this 8th day of September, 1933.

CLARA I. HOUSTON,
(SEAL) *Notary Public.*
My Commission Expires January 22, 1937.

ORDER OF COURT.

And now, to-wit, September 8, 1933, the foregoing petition presented in open court and upon consideration thereof a rule is hereby entered upon the plaintiff to show cause, if any he has, why the prayer of the foregoing petition should not be granted and a hearing before a Chancellor of this Court according to equity procedure held for the purpose of adjudicating the equitable issue whether the policies of insurance identified in the foregoing petition should not be declared void because of misrepresentation and fraud in their procuring. Returnable September 18th, 1933.

PER CURIAM,
G.

Answer to Petition for Hearing in Equity.

(Filed Sept. 18, 1933.)

To the Honorable, the Judges of said Court:

The answer of George A. Adamos respectfully represents:

1. The allegations of the first paragraph of the petition are admitted.

2. The allegations of the second paragraph of the petition are admitted as therein set forth. In addition to the statements set forth therein, plaintiff alleges and says that the defense of the petitioner as stated herein is one of fact to be decided by the jury as to whether or not the insured ever gave the false answers as alleged in the affidavit of defense, and is not an equitable defense that would transfer the present suit from the law to the equity side of the court. Plaintiff further alleges that in addition to the defense set forth in this paragraph by the petitioner, there are other legal issues that must be submitted to the jury for final adjudication.

3. The allegations of the third paragraph of the petition are admitted as stated therein.

4. The allegations of the fourth paragraph of the petition are entirely matters of opinion and conclusion. Plaintiff believes and therefore alleges that the equitable defense as stated by the petitioner is not an equitable defense that is sufficient to transfer this suit from the law to the equity side of the court, but alleges that it is the defense of fraud triable at law. Plaintiff further alleges that the issue of fraud is so closely

related to and interwoven with the additional issues at law involved in the above entitled matter, that it will expedite the disposition of the whole case, save the time of the Court, jury, counsel and parties, if all issues of every kind and character, both legal and equitable issues at law are adjudicated at the same time as equitable defenses and equitable questions raised in issues at law are determined by the various courts of the first instance in the Commonwealth of Pennsylvania, that is, at the same time the case is tried before the jury.

Wherefore, plaintiff prays that the petition for separate hearing in equity be dismissed.

GEORGE A. ADAMOS,
By JOHN D. MEYER,

ALAN S. CHRISTNER,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared ALAN S. CHRISTNER, who, being by me first duly sworn according to law, deposes and says that the averments of fact contained in the foregoing petition are true and correct.

ALAN S. CHRISTNER.

Sworn to and subscribed before me this 18th day of September, 1933.

R. A. MCDONALD,
(SEAL) *Notary Public.*
My Commission Expires June 24th, 1936.

Order.

(Filed Oct. 9, 1933.)

Now, to-wit, October 9, 1933, after argument by counsel for the parties to the above entitled case and due consideration, it is ordered that the rule granted September 8, 1933, to show cause why a hearing before a Chancellor of this Court according to equity procedure should not be held for the purpose of adjudicating the equitable issues involved in the above entitled case, be and it hereby is made absolute.

PER CURIAM,

S.

Eo die, exception noted to plaintiff and bill sealed.

F. P. SCHOONMAKER (SEAL)
Judge.

Transcript of Official Notes of Testimony.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

GEORGE A. ADAMOS,
vs.
NEW YORK LIFE INSURANCE COMPANY. } No. 7424 Law.

And now, to wit, Monday, October 23, 1933, at 10:00 o'clock A. M., the above entitled matter came on

for hearing, pursuant to order of Court granting hearing on equitable issue of fraud, before HON F. P. SCHOONMAKER, *Judge,* at Pittsburgh, Pennsylvania.

COUNSEL PRESENT:

For the Plaintiff: JOHN D. MEYER, ESQ., ALAN S. CHRISTNER, ESQ.

For the Defendant: MESSRS. SMITH, BUCHANAN, SCOTT & GORDON (By WILLIAM H. ECKERT, ESQ.).

HARRIET COLE THOMAS, *Official Reporter.*

Mr. Eckert:

The defendant offers in evidence Defendant's Exhibits "A", "B", "C" and "D", being policies Nos. 11,773,180, 11,773,181, 11,780,717 and 11,780,718 respectively, issued by the New York Life Insurance Company upon the life of Andy Adamos.

Defendant also offers in evidence the following admissions from the pleadings:

From Paragraph 9 of the Affidavit of Defense, under the heading of "New Matter":

"9. The medical examination for each of said four policies of insurance was on April 6, 1932." I think that is insufficiently denied.

The Court:

No, that is not admitted. They admit that one of them was on that date.

Mr. Eckert:

But a mere denial, without attempting to set forth what the proper date was, or anything to the alternative, is I think under the law not sufficient.

The Court:

Isn't there something later in there as to when the date of examination on those policies was?

Mr. Eckert:

No, that is date of delivery.

Mr. Christner:

There was only one examination, and then the other three policies were issued on this one examination.

Mr. Eckert:

That results in the fact that all four policies were based on the one medical examination, made April 6, 1932. The policies show that themselves.

The Court:

If that is the understanding, that there was only one examination, and that examination was on the 6th day of April, 1932, then that is really the only fact that needs to be proved or admitted. If policies were therefore issued after that examination, one or more is not material, I would say, so far as the medical examination is concerned.

Mr. Christner:

We admit there was one examination on April 6th.

The Court:

So far as all four of these policies are concerned?

Mr. Christner:

Yes.

The Court:

That covers it, I think.

Mr. Eckert:

We also offer from Paragraph 11 as an admission that Andy Adamos did not at the time of making application for the policies in suit declare in the application that he had paid to the agent in cash the full amount of the first premium for the insurance applied for, and did not receive from the agent a receipt therefor on the receipt form attached to the application.

Mr. Christner:

That is denied specifically.

The Court:

Isn't this one of the policies where receipt for the first premium is acknowledged on the face of the policy?

Mr. Eckert:

Yes.

The Court:

What difference does it make then?

Mr. Eckert:

It might make the insurance retroactive.

The Court:

He didn't die before the policy actually was issued?

Mr. Eckert:

No. I don't know that it makes much difference, but I think we ought to have the facts correctly. I

submit there is no denial of what I have just read, that the man did not in the application, the part provided for that purpose, declare he paid the premium in full.

The Court:

Well, I think, if you would offer the application, you would get that fact in the record, rather than by this method. It seems to me that the plaintiff is taking the position that the premiums were actually paid, and that is the real fact that might be of value in the trial of the case.

Mr. Eckert:

Your Honor, the application provides, as you will see when you come to it, that the man must not only pay the premium with the application, but must also so state in the form at the bottom of the application for that purpose.

The Court:

What difference does that make, if the insurance company actually issues a policy to him which on the face of it acknowledges the premium?

Mr. Eckert:

It would only tend to establish a date when the premium was paid, that is all. There is no question but that the premium was paid.

The Court:

Well, you can have the benefit of their statement in their reply to new matter, as to the exact date when those premiums were paid.

Mr. Eckert:

No; and what I am offering does not have any bearing—

The Court:

What you are offering practically is a part of the application which is already attached to and a part of the policy.

Mr. Eckert:

But if there is no dispute about this point, I think it ought to be offered in evidence.

The Court:

I don't think it ought to be offered as a separate item. We will not let you offer that.

Mr. Eckert:

From Paragraph 12 of the Affidavit of Defense, under the heading of "New Matter":

> "12. Said Andy Adamos, named as the insured in said policies, was also known as Andrew Adams."

From Paragraph 13 of the Affidavit of Defense, under the heading of "New Matter", we offer the following:

> "13. Between April 6, 1932, and • • • June 16, 1932, said Andy Adamos had consulted and been treated by various physicians, including • • • Dr. M. R. Hadley, Dr. Heinz Langer, Dr. C. B. Schildecker and others."

From Paragraph 18 of the Affidavit of Defense, under the heading of "New Matter," we offer the following admissions:

"18. In fact, said Andy Adamos prior to April 6, 1932, had suffered an accident and injury, had undergone a surgical operation, had been under observation * * * in a hospital, had been found to have high blood pressure * * * and had consulted or been examined or treated by various physicians or practitioners within the immediately preceding five years before April 6, 1932. * * * From April 21, 1932, until April 29, 1932, said Andy Adamos was under observation in the West Penn Hospital and Clinic in the City of Pittsburgh, Pennsylvania. While in said West Penn Hospital and Clinic he was examined and treated by Dr. Heinz Langer, Dr. C. B. Schildecker, Dr. C. H. Ketterer, Dr. R. G. Alley and others. On April 18, 1932, said Andy Adamos consulted and was examnied by Dr. M. R. Hadley. From February 9, 1932, until February 12, 1932, said Andy Adamos was under observation in the St. Francis Hospital in the City of Pittsburgh, Pennsylvania. While in the St. Francis Hospital said Andy Adamos was examined and treated by Dr. A. P. D'Zmura, Dr. Glenn H. Davison and others. About February, 1932, and in 1931, said Andy Adamos consulted and was examined and treated by Dr. Z. Spanos. From March 14, 1926, until July 8, 1926, said Andy Adamos was confined in the South Side Hospital in the City of Pittsburgh, Pennsylvania. While in the South Side Hospital he was examined and treated by Dr. H. E. McGuire. Said confinement of Andy Adamos in the South Side Hospital was on ac-

count of fractures of certain of his lumbar vertebrae, fractures of both of his femurs, a fracture of his left tibia, a fracture at the base of his skull and other injuries sustained by him in an accidental fall on March 14, 1926, while working for the Jones & Laughlin Steel Corporation at Woodlawn (now Aliquippa), Pennsylvania. On account of said injuries, said Andy Adamos underwent a surgical operation by said Dr. H. E. McGuire while in said South Side Hospital. The ailments and diseases from which said Andy Adamos was suffering during at least the last five months of his life and for which he consulted and was examined and treated by the physicians named above and others, except Dr. H. E. McGuire, included carcinoma of the sigmoid intestinal tract, cancer of the prostate gland and surrounding structures, high blood pressure and others. * * *"

Mr. Christner:

This is admitted, except to the extent we do not admit that he was treated by these doctors to the knowledge of the insured for the various diseases mentioned in this paragraph. Our position is that he was examined and treated by various doctors, not knowing what his trouble was, and we do not admit that he was treated for these diseases, because at the time he was under observation all they did was examine him and let him go, didn't even tell him what his trouble was. Therefore we do not admit that he was treated for these, to his knowledge.

Mr. Eckert:

There is nothing stated about the man's knowledge in that admission.

Mr. Christner:

Well, we want it understood that the admission does not cover the fact that he knew he was suffering from these diseases and was treated by these doctors for those diseases.

The Court:

Isn't your admission that he was treated merely the admission that he was treated for a slight stomach disorder?

Mr. Christner:

That is what we admit, that is what he thought he was being treated for.

Mr. Eckert:

They say that is what he was informed he was being treated for, but I think they admit what I have just read.

The Court:

Well, I wouldn't think so.

Mr. Eckert:

In other words, we don't say anything there as to what the man thought.

The Court:

Well, they admit he consulted physicians and practitioners during that period, and that he was under treatment, and was informed he had a slight disorder of the stomach caused by overeating. He ad-

mits that he was under observation in the West Penn Hospital and Clinic, and admits that he was treated by physicians there for a slight disorder of the stomach, as the doctors informed Andy Adamos. I don't think you can get from this paragraph that he was treated for the diseases which you mention. If there is any admission as to the nature of the diseases for which he was treated, it is that he was treated for slight stomach trouble, and I believe you are put to your proof as to the diseases for which he was treated.

Mr. Eckert:

May we have an exception, as a matter of record?

The Court:

We note you an exception.

Mr. Eckert:

From Paragraph 21 of the Affidavit of Defense, we offer the following as an admission:

> Said Andy Adamos on April 6, 1932, knew "that he had consulted and been examined and treated by physicians and practitioners; * * * that he had sustained an accident and injuries; that he had undergone a surgical operation, and that he had been under observation and treatment in hospitals. * * *"

Mr. Christner:

That is admitted, with this qualification: We do not admit that he was treated for the various diseases mentioned.

Mr. Eckert:

We also offer all of Paragraph 23 of the Affidavit of Defense, as follows:

> "23. On August 18, 1932, the defendant disavowed liability under any and all of said policies of insurance and elected to rescind the contracts evidenced by said policies, and notified the plaintiff of its disavowal of liability and rescission and that the insurance never took effect, and tendered to the plaintiff the sum of $1,184.36, being the total amount of premiums received by the defendant upon said policies, with interest thereon from the date of receipt to the date of said tender, and offered to do whatever else, if anything, it ought to do in the premises, and has always since kept said tender and offer good."

We also offer Paragraph 24 of the Affidavit of Defense, reading as follows:

> "24. The defendant herewith tenders judgment in the sum of $1,184.36, being the amount of premiums received by it under said policies, with interest thereon from the date of receipt to the date of the aforesaid tender."

And I would like to have the record show, in connection with that, that we did actually pay into court simultaneously with the filing of this Affidavit of Defense said sum of $1,184.36.

Mr. Christner:

That is admitted, of course with the understanding that we still hold the company liable, even though they did tender the amount of premiums.

The Court:

I suppose that is a necessary part of their proof; if they are going to be successful in securing a cancellation of these policies, they would have to tender back the premium and disavow liability. But that is not the main issue in the case. There isn't any dispute, as I understand it, over the fact that they did tender, but you say you are under no obligation to accept it and that the policies are still in force.

Mr. Christner:

Yes, sir.

Testimony of Dr. Joseph C. Wiley.

Dr. Joseph C. Wiley, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Where do you live, Dr. Wiley?
A. McKeesport, Pennsylvania.
Q. How long have you lived there?
A. Forty-six years.
Q. Are you a graduate of any medical school?
A. I am.
Q. Which one, Doctor?
A. University of Louisville.
Q. When did you graduate from that institution?
A. 1913.
Q. Since then what have you been doing?

A. Practicing medicine in the City of McKeesport.

Q. I believe you were also a doctor in the Army during the war?

A. I was captain in the Army during the war, of the Medical Corps.

Q. Are you on the staff of any hospital?

A. McKeesport Hospital.

Q. I believe you are also president of some medical academy in McKeesport?

A. Vice president of the McKeesport Academy of Medicine.

Q. Are you a regularly licensed and practicing physician in Pennsylvania?

A. I am.

Q. In April, 1932, were you a medical examiner for the New York Life Insurance Company?

A. I was.

Q. Are you still such?

A. No.

Q. Were you subpoenaed in this case?

A. I was.

(Paper marked Defendant's Exhibit "E".)

Q. I show you Defendant's Exhibit "E", and ask you if you know what that is?

A. That is the medical examination of the New York Life Insurance Company application for insurance.

Q. Is that your signature in the lower left-hand corner?

A. It is.

Q. And whose signature is that in the lower right-hand corner?

A. Andy Adamos's.

Q. You saw him sign his name there?

A. I did.

Q. On what day was that medical examination made, Doctor?

A. April 6, 1932.

Q. Doctor, did you ask Andy Adamos Question No. 7-A contained in Exhibit "E": "Have you ever had any accident or injury or undergone any surgical operation?"

A. I did.

Q. What was his answer to that?

A. "No."

Q. Did you ask him Question 7-B: "Have you ever been under observation or treatment in any hospital, asylum or sanitarium?"

A. I did.

Q. What was his answer to that question?

A. "No."

Q. Did you ask him Question 7-D: "Have you ever been found to have a high blood pressure?"

A. I asked him that question and he answered "No."

Q. Did you ask him Question 7-F: "Have you gained or lost in weight in the last year?"

A. No gain and no loss.

Q. You say you asked him that question?

A. I asked him the question and he answered me "No."

Q. Did you ask him Question 8-C: "Have you ever consulted a physician or practitioner for or suf-

fered from any ailment or disease of the stomach or intestines, liver, kidneys or bladder?"

A. I asked him that question, and he answered "No."

Q. Did you ask him Question 10: "Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?"

A. I asked him the question, and he answered "No."

Q. Did you ask him Question 11: "What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?"

A. He answered "None."

Q. You asked him that question, did you?

A. I asked him, and he answered "None."

Q. Did you have any difficulty understanding Andy Adamos when that examination was made?

A. Some difficulty, yes, sir.

Q. Well, were you able to tell that his answers were what you have just stated?

A. Yes, sir.

Q. Did he seem to have any difficulty understanding your questions?

A. Not so much.

Q. Well, did he apparently understand your questions?

A. He did.

Mr. Meyer:

I object, and ask that the question and answer be stricken from the record, because that is

an expression of opinion that the doctor has not qualified himself to express.

The Court:

Well, if the man who was talking to another man cannot express an opinion as to whether or not they understood each other, I don't know who can. We overrule the objection.

Mr. Meyer:

Note me an exception, please.

The Court:

We note you an exception.

Q. Was there anybody else present at the time of this examination, Doctor?

A. No.

Cross Examination:

Mr. Meyer:

Q. I didn't get the first part of your examination. How long have you been practicing medicine?

A. Since 1913.

Q. And you are a graduate of what college or university?

A. University of Louisville, 1913.

Q. And when did you qualify to practice in Pennsylvania?

A. 1914.

Q. And since you have been practicing in Pennsylvania, where have you been practicing?

A. McKeesport, Pennsylvania.

Q. All that time?

A. Barring two years I was in the Army.

Q. And what was your office address at the time you made this examination?

A. 205 Masonic Temple.

Q. What town?

A. McKeesport.

Q. Do you have any particular recollection of this man Adamos and his answers to these questions?

A. I examined a man in my office on that date, sir, who said his name was Adamos. I don't have any particular recollection or recognition of him at this time.

Q. Do you have any recollection of the examination itself, of the examination you made of this man?

A. Why, I made the examination; I have that much recollection that I made the examination, but as to the man—

Q. No, I am not asking you about the man; I am asking you about whether you have any recollection of the man being there, the man Andy Adamos being there and being examined by you?

A. Yes.

Q. Do you have any particular recollection of the questions that have been asked you by counsel here concerning this paper, Exhibit "E"?

A. Yes; I asked him those questions and he answered them as the answers are on there.

Q. Well, have you any particular memory, Doctor, of your asking him this Question 8: "Have you consulted a physician or practitioner for or suffered from any ailment or disease of the brain or nervous system?"

A. I have, because that is a very prominent question on there.

Q. But do you have any recollection that you asked him that question?

A. I asked him all the questions.

Q. On what are you basing your statement that you asked him those questions? Do you remember asking that question?

A. I asked all the applicants the same questions that were on the blank for the company for which I examined.

Q. Now, your manner when you asked the questions was this, wasn't it, Doctor: You were seated at the desk in your office?

A. Yes.

Q. And you read these questions to the applicant, who was seated beside you?

A. Yes.

Q. And did you look at him when you asked him these questions?

A. Absolutely.

Q. Did you turn around and look at him?

A. I turned and asked him this question, yes.

Q. This particular applicant?

A. Absolutely.

Q. Aren't you basing all your statements here, Doctor, solely on the fact that this paper Exhibit "E" was signed by you, and that the answers to the questions are in your handwriting?

A. Yes, but I asked the applicant those answers that I have signed.

Q. Well, you are basing your recollection of that

fact entirely on what appears on this paper Exhibit "E," aren't you?

A. I don't keep any other record.

Q. Will you please answer the question as I have asked it? (Question read.)

A. Yes.

Q. Can you tell us, Doctor, whether or not, when you asked him Question 9 on Exhibit "E": "Have you ever had rheumatism, gout or syphilis?"—whether or not he understood that question when you asked it of him?

A. He answered "No, sir" to the question, I thought he understood it; I suppose he did, or he wouldn't have answered it.

Q. You made no attempt to ascertain whether or not he understood these medical terms?

A. Sometimes with these foreigners, I try to make myself better understood. I don't speak a foreign language, but I try to point and try to make them answer the question to the best of their ability.

Q. Did you try to make him understand the words "rheumatism, gout or syphilis," as you asked him the question that day?

A. He answered "No."

Q. And you didn't make any attempt to ascertain whether he understood you or not?

A. I make an attempt to examine these men, as I am working for this company, sir,—every applicant I make an attempt to make myself understood, as well as examine the applicant.

Q. And as to Question 9 you made no attempt to ascertain whether he understood the words "rheumatism, gout or syphilis," did you?

A. I must have, sir, or I wouldn't have put the answer "No."

Q. But do you have any recollection of having attempted to ascertain whether or not he understood those words?

A. Well, he surely must have understood or he wouldn't have answered my question.

Q. Will you please answer my question? (Question read.)

The Court:

As I understand it, Mr. Meyer, this witness has already stated that his entire recollection is based on this application and the answers there in his handwriting, and that he has no independent recollection of the matter, aside from his being refreshed by the application which is now before him.

The Court:

Q. Am I correct as to that, Doctor?

A. You are, sir.

Mr. Meyer:

Q. I don't want to question you, Doctor, but the only recollcetion you have about this whole matter is what appears on this paper, Exhibit "E"?

A. Yes.

Re-direct Examination:

Mr. Eckert:

Q. Well, Doctor, does that application, Exhibit "E", before you refresh your memory about your examination of this man?

A. It refreshes my memory, yes, that I examined this man on this date, and these answers, but without this blank I would be lost.

Q. Doctor, does seeing that application, Exhibit "E," bring back to your memory your examination of this man, Andy Adamos?

A. It brings back I examined a man by that name on that date.

Q. And the questions that you asked him and his answers?

A. The questions that I asked him and his answers are on that blank.

Q. And you remember that in your own mind, after having had it refreshed by this application blank?

A. Yes.

Q. Doctor, might a man have a cancer of his internal abdominal organs, without your discovering that, in the absence of a truthful history?

A. If it is not an advanced case, he might have, yes, sir.

Re-cross Examination:

Mr. Meyer:

Q. Let us get clear about what this paper brings back to your mind, Doctor. This paper does not bring back to your mind anything excepting what appears on the paper, does it?

A. It brings back that examination on that date, just the same as any record would. That is a record of that examination.

Q. I understand; but you are testifying here

now with respect to this examination solely from what appears on this paper, aren't you?

A. Not necessarily.

Q. Well, what else in addition to what appears on this paper are you testifying about?

A. I am additionally referring to this man that signed his name here (indicating on Exhibit "E"), that I examined him on this date, and I remember visibly what the man told me at the time of the examination, and those answers are here (indicating).

Q. Yes, but do you have any recollection of these answers, excepting as they are written down here?

A. Any recollection of them? I remember asking that man those questions on that date.

Q. Now, on the other side of this paper appear some words that are written in in ink, opposite certain questions. In whose handwriting are they?

A. Those are in mine, I signed that.

Q. Is there any handwriting appearing on the—I will call it the obverse side—the obverse side of this paper, Exhibit "E", which is not in your handwriting?

A. That is all in—no, that isn't in mine (indicating); that "E" or "3", or whatever it is, isn't in my handwriting. All the black ink is in my handwriting.

Q. All the black ink is in your handwriting?

A. Yes, sir.

Q. Then you did find on examination that there was no evidence of past or present disease of the brain or nervous system?

A. I did.

Q. As appears in your answer to Question 24-A. And you took a sample of this applicant's urine?

A. Yes.

Q. And did you examine it yourself or forward it to the company?

A. I don't remember that—just according to the size of the policy. I examined it myself always, and if requested by the company, for a policy of over a certain amount of money, I have to send a sample in. I don't remember in this case the size of this policy, except here he tells me $5,000; and I am allowed to examine that urine and make the report myself, without sending a specimen in. If it is over ten or fifteen or twenty thousand—for this company I wouldn't know, without looking it up—I have to send a specimen in to the home office; but up to five or ten, I think it is with this company, I am allowed to examine the urine myself.

Q. You give the specific gravity here as 101.8?

A. Yes.

Q. You ascertained that yourself?

A. Yes, I ascertained that myself. This is my examination; I told you I wrote it.

Q. Now, what was this man's general appearance as to health, Doctor?

A. Good.

Q. In other words, when you looked at him, he didn't look like a man who was ill?

A. No.

Q. And if he were at that time suffering from a malignant cancer of the genito-urinary organs, particularly of the prostate gland, would the examination which you made of him apprise you of that fact?

A. No.

Q. And would the analysis of the urine which you made apprise you of the fact that he was at that time suffering from a malignant carcinoma of the genito-urinary tract, particularly of the the prostate gland?

A. No.

Q. You have stated here in your report that his weight was 152 pounds, and that his height was five feet five inches. Was there anything in the relation of that weight to that height to indicate to you that this man might be suffering from a malignant cancer?

A. No.

Q. You give other dimensions of his body, that the girth of the chest at the fourth rib was 36 inches, and that the girth of the abdomen at the umbilicus was 34 inches. Was there anything in relation of those dimensions to his height and his weight that would put you on guard and make you suspect that the applicant was suffering from a carcinoma or malignant cancer?

A. No.

Q. You have given here the blood pressure as systolic 134, and diastolic 88, and the age as fifty-four years. Is there anything about those two blood pressures with respect to the man whom you examined and the age that was given to you that would lead you to suspect that this man was suffering from a malignant cancer?

A. No.

Q. You have given his pulse rate as 78. Was there anything in that, considering all the other things you found concerning this applicant,—was there any-

thing in that pulse rate that would indicate to you that this man might be suffering from a malignant cancer of the genito-urinary organs?

A. No.

The Court:

Mr. Meyer, I don't just see the relevancy of the cross examination to the issues that are involved in this case, at the present moment.

Mr. Meyer:

That is the last question I have to ask.

Mr. Eckert:

Q. Doctor, did Andy Adamos sign Exhibit "E" before or after the answers to the question had been inserted?—Can you understand the question?

A. After.

Mr. Eckert:

We offer in evidence Defendant's Exhibit "E".

Testimony of Dr. C. B. Schildecker.

Dr. C. B. Schildecker, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. What is your name, please?

A. Charles B. Schildecker.

Q. You are a regularly licensed and practicing physician, Doctor, in Pennsylvania?

A. Yes, sir.

Q. How long have you been so engaged in Pittsburgh?

A. Since 1901.

Q. Of what school are you a graduate?

A. Columbia University in New York City.

Q. Where is your office, Doctor?

A. 1105 Park Building, Pittsburgh.

Q. Are you on the staff of any hospital in Pittsburgh?

A. Yes, sir; I hold the position of genito-urinologist at the West Penn Hospital in this city.

Q. In what branch of medicine do you specialize, Doctor?

A. Genito-urinary diseases.

Q. And did you at any time examine a man by the name of Andy Adamos, or Andrew Adams?

A. I did.

Q. When was that, Doctor?

A. That was on the 28th day of April, 1932.

Q. Where was that examination made?

A. At the West Penn Hospital.

Q. Just tell the Court what history you had and what condition you found.

Mr. Meyer:

Just a minute, Doctor. That is after the date of the application for this policy, and for all the other policies. I don't think that is relevant at all.

Mr. Eckert:

We are going to show that two of the policies were not delivered until after this examination; and further, that the condition that the doctor found related back long before these policies were applied for, any of them.

Mr. Meyer:

If he will testify to that, all right.

The Court:

Go ahead with the examination.

A. He was admitted to the West Penn Hospital on the 21st day of April, 1932, discharged April 29, 1932. He gave his residence as 328 Franklin avenue, Aliquippa, Pennsylvania; sixty-one years old; had lost fifteen pounds in weight in the four months previous to his admission to the hospital, and had also been steadily losing strength. He complained of pain in the chest, but had no cough.

Mr. Meyer:

Now, I ask at this time that all of the answer so far given by the doctor be stricken from the record, as not being responsive to the question. He was not asked anything about what history this man gave.

The Court:

I understood the question to be what history did he give.

Mr. Meyer:

Well, I didn't understand that.

The Court:

The doctor may go ahead with his answer.

A. (Continuing) On the 28th day of April, in addition to the symptoms I have related, he also complained of frequency of urination, for which reason he was referred to my department. On the 28th day of April I did a cystoscopic examination, which consisted of the insertion of a cystoscope, or instrument, into the bladder, by means of which I am able to observe and see very clearly the bladder and its contents. I found a malignant mass on the right side of the bladder arising from the prostate gland. Upon rectal examination this mass was found to be extending into the rectum in the form of a hard, nodular growth in the lower abdominal wall. On the right side was found an enlarged gland freely movable—

Mr. Meyer:

Q. An enlarged gland?

A. Yes, sir. My diagnosis after this examination was inoperable carcinoma of the prostate gland, involving the bladder, with probable extension into the lung.

Mr. Eckert:

Q. In your opinion, Doctor, how long had that cancerous condition of the prostate gland, and perhaps surrounding structure, existed?

A. The condition that I found must necessarily have existed from one to three or four years.

Q. Was the patient suffering much pain when you saw him?

A. The pain complained of was in the chest.

Frequent urination was the symptom, the chief complaint, at the time he was sent to me.

Q. What evidences would there be to this man himself of this cancerous condition with which he was affected?

A. Frequency of urination was the outstanding symptom.

Q. Would there be any others that would acquaint the man with the fact that he was not well?

A. Well, I would expect to find weakness, pain in the back, loss of weight.

Q. Did you say anything to the man himself to the effect that he was seriously sick?

Mr. Meyer:

That is objected to, as irrelevant and immaterial, unless he told him what was wrong.

Mr. Eckert:

He wouldn't necessarily have to tell him he had cancer; he might tell him he was seriously sick.

The Court:

Well, if you are entitled to any answer to that, you are entitled to the exact words he used.

Q. What, if anything, did you tell this man as to his condition?

Mr. Meyer:

I object to that, as irrelevant and immaterial.

The Court:

Well, I don't know just what material bearing that has on this case, Mr. Eckert.

Mr. Eckert:

It has this material bearing, your Honor: That under the law, as I understand it, it is the duty of an applicant for insurance to inform the company when the policies are delivered to him if he has suffered any impairment of health between the time of his medical examination and the date of delivery of the policies.

The Court:

We overrule the objection.

Q. (Question read.)

A. I did not explain to the man his condition. I do not do that, as a rule, in this type case, because it was referred from another service, and until I know their findings, and my findings and their findings are adjusted to each other, I do not tell the patient anything, without talking with the other physician. I said that I would call it—something like this: "I will give you some medicine, Andy, to ease this up for you. You go up and go to bed." I wrote my findings down and transmitted them to the referring service.

Q. Was the man confined to bed when you saw him?

A. Yes, sir.

Q. Is this cystoscopic examination painful?

Mr. Meyer:

I object to that, as irrelevant and immaterial.

Mr. Eckert:

I think it would impress upon the man that there was something seriously wrong with him.

The Court:

No, I don't think so.

Mr. Meyer:

I will withdraw the objection.

A. Well, it is regarded as a very uncomfortable procedure, at least; and it is with some people very painful, according to their story; others undergo the procedure without any particular trouble. But I would rather not have one; you know you have it all right.

Q. Did the man know, Doctor, that he was seriously sick?

Mr. Meyer:

That is objected to, as irrelevant and immaterial, and calling for an opinion that the witness is not qualified to express.

The Court:

I don't see how the doctor could tell what this man knew. He could tell what the man said and what he said to the man about his physical condition, if anything; he can tell what the man said himself.

Q. Doctor, if you know, will you tell us whether the man said or indicated in any way that he realized he was seriously sick?

Mr. Meyer:

That is objected to, for the same reason as

before, that it is irrelevant and immaterial, and calls for an expression of opinion and drawing of a conclusion, which this witness is not qualified to draw or to express.

The Court:

The doctor may state what this man said to him, and may state what expressions of pain, if any, he gave.

Mr. Eckert:

That is what the question calls for.

The Court:

It calls for more than that; it calls for the doctor to express an opinion as to whether this man knew he was in a serious condition.

The Court:

Q. Go ahead and answer the question, Doctor.

A. The man knew he was very uncomfortable and had no control over his urine, that was quite obvious; and he complained of pain around down here (indicating), and too much urination, too frequent.

Cross Examination:

Mr. Meyer:

Q. You referred to this cystoscopic examination as being rather painful under certain conditions. Those conditions are when there is a stricture of the urethra, aren't they?

A. Yes, that is one of the conditions under which it is painful.

Q. Well, a normal healthy man will have no particular pain due to a cystoscopic examination, will he?

A. Yes, that is right, if it is properly done.

Q. Well, if you do it.

A. I don't, as a rule, expect any great pain, no.

Q. It is a discomfort, and that is all. It merely means the insertion of a small tube in the urethra and the passing of that tube up into the bladder?

A. That is right.

Q. And it has to pass the opening into the bladder, which is closed by a muscle which is very easily dilated by a careful operator, such as you?

A. Yes, sir.

Mr. Eckert:

Q. Doctor, you were subpoenaed by the insurance company in this case?

A. I was.

Mr. Meyer:

Q. You said in answer to one of the questions that this man was confined to bed at the time you examined him. The records show that he was discharged the day after you made the examination. He was able to walk, wasn't he?

A. He was brought down in bed.

Q. I know; but did you make any attempt to ascertain whether or not he was able to walk?

A. No, I did not.

Q. He was in the hospital for observation, wasn't he? Wasn't that the report that was brought to you?

A. For diagnosis, I think.

Q. Yes, for observation for the purpose of diagnosis?

A. Yes, sir.

Q. He wasn't in there because of any particular disease that he was suffering from?

A. Well, I don't know of any other reason why he was there.

Q. What I mean is, he wasn't in a prostrate condition? There was something wrong with him, but at the same time there was nothing to indicate that he was approaching dissolution, or anything of that sort?

A. Well, not just approaching dissolution, but according to the report that I made the man was obviously in serious physical condition.

Q. Now, you state that the principal difficulty this man had—or the principal notice that he had that there was something wrong with him was the frequency of urination. Now, that frequency of urination is not diagnostic necessarily of cancer, is it?

A. Well, it may or may not be.

Q. But it isn't necessarily diagnostic of that? There are a considerable number of other conditions in a man of this age where you find frequency of urination and no cancer?

A. Of itself alone it is not diagnostic of cancer.

Q. And there was nothing about this man's condition when you examined him that would indicate to a physician who was examining him for life insurance that he was suffering from carcinoma?

A. Not in the ordinary casual life insurance; such a thing could only be suspected, but not confirmed.

Q. And you only suspected it until you made this cystoscopic examination?

A. Yes, that is true; you have to see these things before you can be sure.

Q. And today, from your examination, you are not able to state as a scientific fact that this man had a malignant cancer in the region of the bladder, are you? You took no sample and made no miscroscopic examination of the growth, did you?

A. No, I did not; but at the same time I gave my diagnosis and subsequent developments verified it.

Q. Surely; but at the same time, a nodular growth might not have been carcinoma, it might have been a growth of something else?

A. It could have been sarcoma.

The Court:

I can't just see, Mr. Meyer, what this learned dissertation on these various diseases is doing to help us with reference to the issues in this case.

Mr. Meyer:

Well, the big issue is whether or not this man knew he had this cancer; that is the whole question that is before your Honor. If he did not know it, then it seems to me there is complete liability.

Re-direct Examination:

Mr. Eckert:

Q. Doctor, was this cancer far advanced, would you say?

A. It was.

Q. Was there anything that could be done for the man except relieve these pains?

A. Nothing could be done, in my opinion.

Mr. Meyer:

Q. You said you talked to this man?

A. Yes.

Q. Do you remember, from his manner of speech, did he have any difficulty in understanding you?

A. I can't just remember, to say that. I remember I said, "Andy, going to be better; we give you some medicine, give you some more treatment; send you upstairs, you will be all right." The man was nervous and excited, and I did that merely as a comforting matter to him, and to settle his nerves and let him think we had done something.

Q. Well, you talked to him as you would talk to an ignorant, dumb foreigner? That is what you thought you were talking to?

A. Well, yes, I did.

Q. And it was quite evident that was the fact?

A. Yes.

Testimony of Dr. David Allen Belinky.

Dr. David Allen Belinky, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Doctor, of what school are you a graduate?

A. Temple University, Philadelphia.

Q. And what year did you graduate from that institution?

A. 1927.

Q. In 1931 were you a regularly licensed and practicing physician in Pennsylvania?

A. Yes, I was.

Q. Where, Doctor?

A. Well, I don't know just what you mean by "where."

Q. I mean in what town or city.

A. Oh,—in Aliquippa.

Q. And did you at that time attend a patient by the name of Andy Adamos, or Andrew Adams?

A. I did.

Q. When was it, Doctor?

A. It was November 12, 1931.

Q. Where did you attend him at that time?

A. At his residence.

Q. What was his condition at that time?

A. Well, he was complaining of suffering pain in his back, and also generalized abdominal pain.

Q. Was he up and about, or in bed?

A. No, he was in bed.

Q. Was he suffering much pain or not?

A. Well, I had to have assistance to examine him.

Q. Then he was suffering much pain?

A. He was.

Q. What did you prescribe for him, Doctor?

A. Well, I prescribed a rather powerful sedative, and also something to get his bowels cleaned out.

The Court:

Q. Doctor, what do you mean by, you had to have assistance to examine him?

A. Well, I had to have one of the men hold him up while I was examining his back; that is what I mean.

Mr. Eckert:

Q. And what do you mean by "a powerful sedative"?

A. Well, I gave him a half grain of codein and a half grain of alanol.

Q. That is something on the order of morphine?

A. No; it is a narcotic, but it isn't as powerful as morphine.

Q. Did you see him after that, Doctor?

A. I really don't recall whether I did or not. I don't think I did, because since the time that I examined him I am not located in Aliquippa, and I just have a record of having made the first call and having seen this man, and also my diagnosis for that date.

Q. When did you leave Aliquippa?

A. I left it in December, 1931.

Q. Do you know whether the man continued to be confined to bed after November 12, 1931?

Mr. Meyer:

Q. Of your own personal knowledge, do you know that?

A. Of my own personal knowledge, no.

Cross Examination.

Mr. Meyer:

Q. Doctor, this treatment you gave him was such as you would give any person who was suffering from pain in the abdomen, wasn't it?

A. And pain in the back.

Q. And you have no means of knowing what he was suffering from?

A. I thought he had a sacroiliac arthritis, and also a badly constipated bowel.

Q. A bad case of constipation. That is all, Doctor.

Testimony of Dr. B. T. Owens.

Dr. B. T. Owens, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Doctor, you are a regularly licensed and practicing physician in Pennsylvania?

A. I am.

Q. Of what school are you a graduate?

A. Jefferson Medical College, Philadelphia.

Q. In what year did you graduate from that institution?

A. 1919.

Q. Where are you located?

A. 377 Franklin avenue, Aliquippa, Pa.

Q. Did you in 1931 treat a patient by the name of Andy Adamos, or Andrew Adams?

A. I did.

Q. What was the date of those examinations in 1931, Doctor?

A. December 11, 1931 and December 28, 1931.

Q. Where did you see him at that time, Doctor?

A. 119 Kiehl street, Aliquippa— No, it is Oakwood street; 119 Oakwood street.

Q. What did you find to be the man's condition at that time?

A. You mean the man's complaints, as well as my findings?

Q. Yes.

A. He was complaining of indefinite pains throughout his abdomen, and the only localization of pain I could get was over the McBurney's Point, and I thought it was a chronic appendix. That was my diagnosis at that time.

Q. Was he suffering much pain at that time?

A. He complained of pain; I couldn't tell you the degree.

Q. Was he up and about, or confined to bed at that time?

A. He was in bed when I saw him.

Q. What did you prescribe for him at that time?

A. You mean, do I recall the prescription, the ingredients?

Q. Yes.

A. Strontium bromide; tincture of belladonna; fluid extract of cascara sagrada, aromatic; caripeptic liquid.

(Paper marked Defendant's Exhibit "F".)

Q. Doctor, I show you Exhibit "F", and ask you if that is the prescription to which you have just referred?

A. It is.

Q. Well, you saw him next on December 28, 1931, did you say?

A. That is right.

Q. What was his condition at that time?

A. He was not complaining of so much pain. He seemed to be weaker, and I prescribed a tonic at that time.

Q. Was he in bed when you saw him at that time?

A. He was in bed when I saw him.

Q. The second time?

A. Yes, sir.

Q. When again before March of 1932 did you see him, Doctor?

A. February 23, 1932.

Q. And on February 23, 1932, where did you see him?

A. I don't remember whether it was at 119 Oakwood or 109 Oakwood, I can't remember.

Q. What was his condition at that time?

A. He apparently was weaker, and had lost weight,—that is, he seemed apparently to have lost weight, I didn't weigh him, and couldn't say actually. And at that time I felt a mass in the lower left abdomen.

Q. And what diagnosis did you make of that mass in the lower left abdomen?

Mr. Meyer:

Objected to, unless the diagnosis was made known to the insured.

The Court:

We overrule the objection.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

A. The diagnosis, I didn't make it to the patient or to the relatives, but I suspected a carcinoma of the rectum or lower bowel.

Q. Was the man in bed at that time?

A. He was.

Q. Was he suffering much pain at that time?

A. He was suffering some, I believe; I couldn't say just definitely how much.

Q. Did you say anything to the patient at that time regarding the nature of his illness?

A. Not to the patient; to his relatives, or to the people who were at the home at the time.

Q. Do you know whether the patient then knew that he was seriously sick? Did he say anything, and if so, what, to that effect?

A. Did I say anything or he?

Q. He.

A. Nothing that would indicate that he knew he was seriously ill, had any dangerous illness.

Q. You were subpoenaed by the insurance company in this case?

A. I was.

Cross Examination:

Mr. Meyer:

Q. What is that last drug on that prescription there?

A. Caripeptic liquid.

Q. And the cascara sagrada that you prescribed there,—both of them were given with the idea of having an effect on the bowels, loosening the bowels up?

A. The cascara had that effect.

Q. And you suspected from the examination the first time that this man had appendicitis?

A. That was my suspicion, yes.

Q. Did anybody tell you when you saw him on December 28th that he had been in bed since December 11th?

A. That is, not that he had been in bed continuously, no.

Q. Did anybody tell you on December 11th that he had been in bed from November 12th until December 11th?

A. No.

Q. And you had no reason to believe he had not been?

A. I had no reason to know, but I know he was in bed when I made the examination.

Q. Did you talk to him at any of these times?

A. I would direct the questions probably to him, but mostly through the interpreter.

Q. Oh, you talked to him through an interpreter?

A. Most of the questions were put to him through an interpreter.

Testimony of Dr. Zacharias Spanos.

Dr. Zacharias Spanos, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. You are a regularly licensed and practicing physician in Pennsylvania?

A. Yes, sir.

Q. Your office is in Pittsburgh?

A. Yes, sir.

Q. Did you know Andy Adamos, or Andrew Adams, in his lifetime?

A. Yes, I did.

Q. How long did you know him?

A. Oh, about ten years.

Q. When did you last see him professionally?

A. In February, 1932.

Q. Dr. Spanos, of what school are you a graduate?

A. Medical school of Greece.

Q. Is your nationality Greek?

A. Yes.

Q. I believe Mr. Adamos was also originally from Greece. Is that right?

A. Yes.

Q. You say you last attended him professionally in 1932?

A. 1932 is right.

Q. And just tell the Court under what circumstances you saw him at that time, what you found, and what you did for him.

A. He came at my office for a physical examination; he was complaining about pain, in his abdomen was slight pain, and he told me he was visiting different doctors before, some of them told him he had appendix, some he had gallstones, or something like that; and after I had examined him I couldn't satisfy myself with the diagnosis, what was the cause of it, and I sent him to the St. Francis Hospital, to Dr. Andrew D'Zmura.

Q. Did you find any mass in his abdomen at that time?

A. As far as I remember, I did not.

Q. Where were these pains that you said he was complaining of at that time?

A. On the lower abdomen; very, very indefinite.

Q. And you say that some of the doctors told him, according to what Adamos told you, that he had appendicitis, and that other doctors had told him that he had gallstones?

A. That is the story that he told me.

Q. That is the story that Adamos told you?

A. That he told me, yes.

Q. Now, before February, 1932, when had you last treated Mr. Adamos?

A. Usually I don't keep any records, but a couple years before that time he came at my office.

Q. Didn't you treat him in 1931 for hypertrophy of the prostate?

A. Not in 1931; 1930 probably. You see, I don't keep any records. As far as I remember, I moved my office,—I was located at 527 Fifth avenue before, and I believe, as far as I can recollect, he was coming to that place, not up to where I am now.

Q. Well, before 1932 had you treated him for hypertrophy of the prostate gland?

A. Yes, I did in 1930, as far as I can remember—in 1930 or 1929, something like that.

Q. How many times would you say you treated him for that?

A. I can't recollect, but I suppose about six or seven times.

Q. You were subpoenaed by the insurance company in this case?

A. Yes, I was.

Cross Examination:

Mr. Meyer:

Q. This hypertrophy of the prostate means enlargement of the prostate?

A. Yes.

Q. A very common disease among men after they pass the age of fifty?

A. Yes.

Q. And the principal evidence of the enlargement is excessive urination, isn't it?

A. That is correct; frequency of urination.

Q. It is frequency, rather than quantity, isn't it?

A. Rather frequency.

Q. When you talked to him, you always talked in Greek, I suppose?

A. Yes, I did.

Q. Did you ever talk to him in English?

A. I never did.

Mr. Eckert:

Q. Doctor, may not these treatments for hypertrophy of the prostate gland have been in 1932?

A. As far as I remember, I did not. In 1930—I can recollect from the time when I moved my office. He was coming down at 527 Fifth avenue, and I moved in January, 1931, up to Wylie avenue, so I do remember if he ever was up at the new number.

Mr. Meyer:

Q. Doctor, when this man came to you and told you that he was urinating excessively, you gave him some drugs, didn't you,—some medicine?

A. I can't recollect now whether I did.

Q. You can't recall what you did?

A. What medicine I did give to him.

Q. But you did give him some medicine, didn't you?

A. No, I did not; I make him some local treatments.

Q. Some massage treatments?

A. Yes.

Q. And that is all?

A. Yes.

Q. And that is all you did these six or seven times he was there?

A. That is what I did.

Q. And were these local treatments internal or external?

A. External, through the rectum.

Q. Then they were internal?

A. Well, I don't know whether you call it.

Q. Did you use any drug?

A. No, I did not.

Q. No drug at all; just manipulation—a manipulation of the prostate gland through the rectum?

A. Yes.

Q. And that is all you did do?

A. That is what I did.

Q. And that was a painless operation?

A. That is correct.

Q. Did you tell him at any time that he was suffering from cancer?

A. I never made any diagnosis of cancer for him.

Q. And so you didn't tell him?

A. No.

Mr. Eckert:

If the Court please, I would like to plead surprise, so far as the testimony of this witness is concerned, relative to the date when he treated Adamos for the hypertrophy of the prostate, because he told us in writing that those treatments had been in 1931.

The Court:

You may cross examine him.

The Witness:

I specified that I don't have any records, and I remembered from my memory—

Mr. Eckert:

Q. Well, just answer questions, please.

(Paper marked Defendant's Exhibit "G".)

Q. Doctor, I show you Exhibit "G", and ask you if that is a letter written by you?

A. Yes, that was written by me.

Q. And is Exhibit "G" signed by you?

A. Yes.

Q. And that is on your own stationery?

A. Yes.

Q. And does that not say in there Doctor "and several times during the year 1931 I treated him for hypertrophy of the prostate"?

A. Yes, it did, but as I said before, I haven't any records, and whatever I did over there I said from my memory, so maybe instead of 1930 I wrote 1931.

Q. This letter was written when, Doctor?

A. February 14.

Q. 1933?

A. Yes. Two years after; so I can't remember.

Q. But your memory was fresher then than it would be now, eight or nine months later, wasn't it?

A. I couldn't say.

Mr. Eckert:

We offer in evidence Exhibits "G" and "F".

Testimony of Dr. Andrew P. D'Zmura.

Dr. Andrew P. D'Zmura, a witness produced on behalf of defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. What is your full name, please?

A. Andrew P. D'Zmura.

Q. You are a regularly licensed and practicing physician?

A. I am.

Q. Of what school are you a graduate, Doctor?

A. University of Pittsburgh.

Q. In what year did you graduate from that university?

A. 1912.

Q. Are you on the faculty of the medical school of that university at the present time?

A. I am.

Q. And have been for how long?

A. About twenty years.

Q. What do you teach?

A. I teach medicine.

Q. Is there any particular branch?

A. Well, I have had a great many courses in that department, ranging from physical diagnosis in the normal, or supposedly normal individual, all the way through to the consideration of various diseases, and lecturing on the cardiac system, giving clinics to the senior students on the advanced work.

Q. Are you on the staff of any hospitals?

A. I am on the staff of St. Francis Hospital, Pittsburgh Hospital and Magee Hospital.

Q. You were subpoenaed by the defendant in this case?

A. I was.

Q. Dr. Spanos has testified that he sent to you in February, 1932, a man by the name of Andy Adamos, or Andrew Adams. Did that patient come to you?

A. He did.

Q. And where did you see him, Doctor?

A. I saw him at St. Francis Hospital.

Q. Do you know, Doctor, that the papers before you (indicating) are the original records of the St. Francis Hospital?

A. I do.

Q. And between what dates did you see that patient in that hospital, Doctor?

A. Between the dates February 9, 1932, and February 12, 1932.

Q. What history did you receive, Doctor?

A. The history which was taken by the interne was obtained—

Mr. Meyer:

Then I object to the doctor testifying to the history. The doctor didn't take the history at all.

The Witness:

It is not the custom for the staff man to take the history.

Q. Doctor, what history did you yourself receive from Andy Adamos, if any?

A. I received the history in the customary fashion in the hospital.

Mr. Meyer:

Q. Please answer the question that was asked you.

A. I wasn't able to speak very much with the patient. I have from my high school and college work, however, a limited knowledge of Greek, and among the Greek words that I know, of course, is the one for "pain". That word is "ponus". I asked the patient, "Pou ponus?"—"Where do you have pain?", "Where the pain?" And he showed me, pointing to the lower abdomen. Apart from the consideration of his pain, I depended for my findings upon the consideration of the history that was obtained in the usual manner by the interne through a son of the patient.

Mr. Eckert:

Q. Doctor, what did you find this man's condition to be when you saw him from February 9 to February 12, 1932?

A. He was obviously a very sick individual. He wore an anxious expression, as though he were in pain; his color was pale; and it is my opinion—

Mr. Meyer (to witness):

You weren't asked for an opinion yet.

Mr. Eckert:

Certainly it is his opinion.

Q. Go ahead, Doctor.

A. And it is my opinion that anyone with the least amount of medical training would have agreed that the patient was obviously very ill.

Mr. Meyer:

I ask that that part of the doctor's answer be stricken from the record, as not responsive to the question that was asked. It is a voluntary statement.

The Court:

I think the doctor probably must give us his opinion as to whether the man was seriously ill, not what other persons might think about it.

Mr. Eckert:

As I understood it, he was just using that as an illustration of the extent to which it was obvious.

Q. Doctor, in your opinion, specifically what was wrong with this man when you saw him in February, 1932?

A. In my opinion, he was suffering from inoperable carcinoma involving the prostate gland and the surrounding structures.

Q. In what state of progress would you say that cancer was at that time?

A. Very advanced.

Q. Was the man suffering very much pain?

A. He was suffering pain, because it was necessary for us to give him narcotics in order to relieve that pain.

Q. Was this mass that you refer to very noticeable or not?

A. To the skilled observer it was present on mere inspection of the abdomen; that is, just looking at the uncovered abdomen, one who is familiar with the appearance of the abdomen under normal conditions could see a slight ejection in the left lower portion of the abdomen, and when one felt this mass it was very hard, and it was obviously something which did not belong there in the normal individual.

Q. What did you prescribe for the man, Doctor?

A. Apart from the narcotics, no treatment was ordered, because—

Mr. Meyer (to witness):

Just answer the question that was asked you.

The Court (to witness):

Go ahead, Doctor.

A. (Continuing)—after discussion with the son of the patient, to whom it was pointed out that the condition was incurable, so far as we could tell, it was decided not to keep the patient in St. Francis Hospital,

to confirm the impression that the carcinoma had already spread widely throughout the body by subjecting the patient to a series of X-ray examinations. It was felt that such a procedure would have added to the cost, and the general impression was that the procedure would not have assisted the patient. So that the son was given a prescription for codein, and referred back to the family physician.

The Court:

Q. What was the name of that son?

A. I don't recall it, your Honor; he is present in the court room.

Mr. Eckert:

Q. Do you remember whether it was George?

A. I don't recall. He is present in the court room; he is just getting up there now. (Man indicated requested to stand up.)

Mr. Meyer:

Q. Is that the man you are referring to?

A. That is the man.

Mr. Meyer:

That is George Adamos.

(Paper marked Defendant's Exhibit "H".)

Mr. Eckert:

Q. I show you Exhibit "H", and ask you if that is the prescription to which you have just been referring?

A. That is.

Q. And is that your handwriting in the upper righthand corner, "Inoperable carcinoma"?

A. "Inoperable carcinoma" is put in there because when narcotics are ordered in unusual quantity, it is wise to put in the diagnosis, so that the State or Federal Narcotic Department will not make an unnecessary inquiry into the reason for ordering an exceptional amount of narcotic.

Q. Then you did yourself write "Inoperable carcinoma" on that prescription when you issued it?

A. I did.

Mr. Eckert:

We offer in evidence Defendant's Exhibit "H".

Q. Doctor, what if anything was there to convey to Andy Adamos's mind in February, 1932, that he was gravely ill?

A. Well, he was very weak, and he was complaining of pain, and he had lost weight.

Q. Was he confined to bed while he was in the hospital?

A. He was.

Q. Was his pain and weakness sufficient to convey to a man's mind that he was seriously sick?

A. If he had an ordinary degree of perspicacity, he must have known he was very sick.

Cross Examination:

Mr. Meyer:

Q. You say that he was confined to bed during the time that he was in the hospital?

A. Well, essentially, yes.

Q. He was only kept in bed for the purpose of making an examination, wasn't he?

A. He wanted to stay in bed.

Q. Well, but he walked to the hospital?

A. I don't know; I didn't accompany him; I can't testify as to how he got to the hospital.

Q. You want us to understand that he was so weak physically on the day or days that you examined him that he was unable to walk?

A. I didn't examine him in the upright posture, and I wasn't present during the entire twenty-four hours of each day, and he was at St. Francis Hospital only for three days for the purpose of diagnosis.

Q. Well, you don't know whether he was walking about ordinarily or not, do you?

A. No, I have no knowledge of that.

Q. Well, from your examination of him as you made it, would you say that he was or was not able to walk?

A. I don't think that that is material, but the point is—

Q. Well, will you please answer my question? That question is for the Court to determine.

A. The point is that if he did walk, he shouldn't have been walking, he should have been resting just as much as possible, in order to conserve his rapidly leaving strength.

Q. And you are basing that on your observation made in February?

A. That is all I can base it on, because that is the only time that I saw this individual.

Q. What size was this lump that you found in the abdomen?

A. Roughly, several inches.

Q. How many?

A. Oh, two or three; somewhere in that neighborhood.

Q. Not as large as an apple, then?

A. It depends on whether you are talking about a small apple or a large apple. In medicine we have to be more specific than that.

Q. Well, what was the general shape of it,—about the shape of an ordinary apple?

A. No, it wasn't of that shape, because I thought it was due to an extension or an involvement of the pelvic colon, that is the lower part of the large bowel, and that is of course cylindrical, it is not circular.

Q. Was there any tenderness where you found this lump?

A. That varied from time to time, and of course it is very difficult —You see, tenderness is something of which a patient complains; tenderness is not something that a doctor can elicit by his examination.

Q. What is your answer to my question?

A. Well, the answer—I am trying to explain to you what tenderness is. Tenderness is a subjective symptom—

Q. I happen to know that, Doctor. Now, will you please answer my question? Was there any tenderness—

A. I can't tell about that except from the story that the patient gives me, unless it is very marked tenderness, and then of course there will be some expression on his face which indicates pain.

Q. Now, will you please answer my question?

A. I am trying to answer it.

Q. Was there any tenderness over this lump that you found in this man's abdomen on your examination?

A. He had general abdominal tenderness when I examined him.

Q. What do you mean in this report here (indicating hospital record), where you say "Some tenderness on deep palpation"? What does that mean in this record?

A. I will try to explain it to you. When we examine a patient we use various degrees of pressure. At times tenderness is present with very slight pressure on the abdomen, and at other times we have to exert a greater force against the abdominal wall in order to bring out this pain.

Q. And so you had to squeeze down on his abdomen away down deep, in order to get any sign from the patient that there was pain; didn't you?

A. No. When you say "away down deep", of course you didn't see the abdomen in this patient. It was scaphoid, that is, it was sunken in; and it was no feat at all to use deep palpation, because this individual had lost weight, he didn't have the ordinary amount of fat on his abdominal wall, for instance.

Q. But at the same time you did use deep palpation, and until you did use that you didn't get pain, did you?

A. Well, that is mere routine; you can't use light—

Q. I am not arguing with you, Doctor. I wish you would just answer these questions; we would get along lots better.

Mr. Eckert:

Let him finish his answer.

Q. Finish your answer; and at the same time I wish you would answer my question.

A. Well, the patient complained of pain without any pressure at all, from time to time.

Q. Well, what do you mean by this statement in your report here, "Some tenderness on deep palpation"?

A. Well, that is a rather indefinite method of expression on the part of the interne. Now, that "some" is very indefinite; and the question of deep palpation is something that varies with the examiner. One physician may feel the abdomen of a patient and think that he is using comparatively light palpation, whereas another physician may just do the reverse, make very deep pressure and think that he is using light pressure. That is very indefinite.

Q. I see. So this statement here doesn't mean anything?

A. Oh, yes.

Q. Well, what does it mean?

A. It conveys to a trained mind, and one who is capable of assessing these facts at their real value, a true picture of the patient. In other words, the phraseology here is perhaps a little bit ambiguous to one who is not used to—

Q. To ambiguous statements, yes, I understand, Doctor.

A. (Continuing)—to reading a history, but to any physician that is very informative.

Q. What size was the prostate gland, Doctor, when you examined him?

A. I didn't examine the prostate gland.

Q. Did you talk to this patient at all?

A. I did. I was able to speak just a very few words of Greek to him. I have already said I asked him where his pain was.

Q. And you used the Greek word "ponus"?

A. I used the Greek word "ponus".

Q. You couldn't talk to him, then, in English?

A. No, I couldn't carry on a conversation in ordinary English; I didn't attempt to, because his son was present.

Q. You didn't tell this man he was suffering from cancer or carcinoma?

A. I did not, because it is not the custom of doing that with patients, if there is a responsible relative present to whom the information can be conveyed.

Q. I didn't ask you anything about why, I just asked you whether you told him.

A. That was just to save time.

Mr. Eckert:

Q. Doctor, was what Mr. Meyer read in this hospital record about deep palpation your report or someday else's report?

A. That was the report of the interne who does the routine work in the hospital.

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

Testimony of Dr. Glenn H. Davison.

Dr. Glenn H. Davison, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. What is your full name, please?

A. Glenn H. Davison.

Q. You are a regularly licensed and practicing physician in Pennsylvania?

A. I am.

Q. And have been for how many years, Doctor?

A. Since 1920.

Q. Of what school are you a graduate?

A. University of Pittsburgh.

Q. What year did you graduate from that school?

A. 1919.

Q. Where is your office?

A. 1005 Westinghouse Building, Pittsburgh.

Q. Do you specialize in any particular branch of medicine?

A. I do.

Q. What branch?

A. Genito-urinary diseases.

Q. And are you on the staff of any hospitals in Pittsburgh?

A. St. Francis Hospital.

Q. Did you examine Andy Adamos, or Andrew Adams, while he was in the St. Francis Hospital in February, 1932?

A. I did.

Q. Tell the Court what you found, Doctor.

A. I was called in consultation on this case by the medical service for an examination of the prostate. I found a very marked involvement of the prostate gland, involving the entire structures between the rectum and the bladder. It was a hard induration and infiltrated into all the surrounding tissues.

Q. And was that involvement of a cancerous nature?

A. I diagnosed it as such.

Q. Would you say that was a far advanced case of carcinoma?

A. I would.

Q. Did you think that his condition was curable?

A. I did not.

Q. Was there anything that could be done for him, except alleviation of his pain?

A. That was all.

Q. Was the patient in bed when you saw him?

A. He was.

Q. In your opinion, was this man an insurable risk when you saw him in February, 1932?

Mr. Meyer:

Objected to; there is no definition here of what an insurable risk is, or may be.

Mr. Eckert:

This doctor no doubt has a fair idea of what that is.

The Court:

Well, that isn't the ground of this equitable proceeding, Mr. Eckert.

Q. Doctor, in your professional opinion, would it have been material for a person or company considering whether to underwrite Andy Adamos's life in April, 1932, to have been informed and have known what you found in February, 1932?

Mr. Meyer:

That calls for an expression of opinion. It is not medical; it is mixed medical and legal.

The Court:

I think that is all right; I think we will hear that.

Mr. Meyer:

Will you note us an exception, please?

The Court:

We note you an exception.

Q. Answer the question.

A. I don't quite understand just what you mean by that.

Q. Would the condition which you found in February, 1932, materially affect the longevity of Andy Adamos, or Andrew Adams?

A. Yes, it would.

Q. From the condition which you found in February, 1932, what was your opinion at that time as to how long this man would continue to live?

A. If I remember, I gave a prognosis of six months, to his son at that time.

Q. Is that the same man that Dr. D'Zmura referred to?

A. I couldn't possibly identify him; I don't remember.

Cross Examination:

Mr. Meyer:

Q. Did you tell the patient, Andy Adamos, that he was suffering from an incurable cancer?

A. I did not.

Q. How did you talk to Mr. Adamos?

Mr. Eckert:

He said he didn't talk to him.

Q. To the patient,—did you talk to the patient?

A. Merely to request him to cooperate with the examination.

Q. And did you have any extended conversation as to his history, or anything of that sort, with him?

A. I did not.

Mr. Eckert:

Q. He understood what you told him about cooperating with you in making this examination?

A. He did.

Q. You told him that in English?

A. Yes.

Mr. Meyer:

Q. Well, all that consisted of was "Raise your arm" or "Take your clothes off" or—

A. No; I got him on the floor, bending over the bed, as I prefer to have them during the examination.

Q. Well, you told him to bend over this way (indicating)—very simple language?

A. Yes.

Mr. Eckert:

Q. You told him to get out of bed and bend over the bed?

A. Yes.

Q. And he understood you?

A. Yes.

Testimony of Dr. M. R. Hadley.

Dr. M. R. Hadley, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. You are a regularly licensed and practicing physician in Pennsylvania?

A. I am.

Q. Of what school are you a graduate?

A. Howard University.

Q. When did you graduate from Howard University?

A. 1925.

Q. How long have you been practicing where you are now?

A. Since 1929.

Q. And where is that?

A. McKeesport.

Q. You were subpoenaed by the insurance company in this case?

A. I was.

Q. Did you at any time attend a patient by the name of Andrew Adams, or Andy Adamos?

A. I did.

Q. When was that, Doctor?

A. That was on April 18, 1932.

Q. Do you have a written record of that visit?

A. I have.

Q. Where did you see this patient?

A. I saw him at 1001 Jenny Lind street, McKeesport.

Q. What was the patient's condition when you saw him on April 18, 1932?

A. He was in very marked pain, and he was groaning.

Q. In addition to this marked pain and groaning, was he in bed?

A. He was in bed.

Q. What history did you receive, Doctor?

A. A history of vomiting and pain in the pit of his stomach, and constipation.

Q. What did you prescribe for the patient?

A. I don't remember the prescription, but I did write one. I gave him a narcotic at the time to alleviate the pain, and I wrote a prescription, the contents of which I do not know, because I haven't refreshed it, I don't know what drug store it was taken to.

Q. Was it something of a narcotic nature, to act as a sedative?

A. A sedative action.

Q. And relief from pain?

A. Yes.

Q. As what did you diagnose the condition?

A. Well, I had in my mind the opinion of cancer. I didn't make a definite diagnosis, I rather referred the case to West Penn Hospital, to Dr. Langer.

Cross Examination:

Mr. Meyer:

Q. Did you talk to the patient?

A. No, I did not.

Q. You didn't talk to the patient at all?

A. He was groaning most of the time, and I talked with the son.

Q. You went to their home, did you?

A. I went to 1001 Jenny Lind street.

Q. Was that their home?

A. I don't know. The first call I made, that is all.

The Court:

Q. The son that you talked to was the man that was identified this morning?

A. He was there at the time. There were several there. I don't know whether I talked with him alone or with the others; I took for granted the other was his son also. I talked with this one also, if that is his son.

Mr. Eckert:

Q. By "this one" you mean the one that Dr. D'Zmura identified this morning?

A. The one that stood up in court, yes.

Mr. Meyer:

This is George Adamos, the plaintiff in this case.

Testimony of Dr. C. H. Ketterer.

Dr. C. H. Ketterer, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Dr. Ketterer, you are a regularly licensed and practicing physician?

A. Yes, sir.

Q. Of what school are you a graduate?

A. University of Pennsylvania.

Q. And in what year did you graduate from that institution?

A. 1912.

Q. You are practicing in Pittsburgh now?

A. Yes, sir.

Q. Are you on the staff of any hospitals?

A. West Penn Hospital.

Q. I believe you are also connected with the Veterans' Bureau in Pittsburgh?

A. Yes, sir.

Q. In what capacity?

A. Doing heart examinations for the Veterans' Bureau.

Q. You were subpoenaed by the insurance company in this case?

A. Yes, sir.

Q. Did you examine Andy Adamos, or Andrew Adams, when he was in the West Penn Hospital in April, 1932?

A. Yes, sir.

Q. When, Doctor?

A. 22nd.

Q. And did you receive any history from him?

A. Some, yes, sir.

Q. What history did you receive from him?

A. The history of loss of weight and weakness and pain in his back and chest, and difficulty in urinating.

Mr. Meyer:

Q. Did you say "difficulty"?

A. Yes, sir.

Mr. Eckert:

Q. You received that history from him in English, did you, Doctor?

A. With a great deal of difficulty.

Q. But you did receive it in English, did you?

A. Yes, sir.

Q. Upon your physical examination of him, what did you discover?

A. I found a huge mass in his abdomen.

Q. And what did you diagnose that mass to be?

A. Carcinoma.

Q. What was the extent or stage of it?

A. It seemed to be very far advanced.

Q. Was there any metathesis to any other parts of the body?

A. I thought at the time there was metathesis.

Q. What do you mean by "metathesis"?

A. It means there is an extension of the growth to another part of the body.

Cross Examination:

Mr. Meyer:

Q. You said there was a huge carcinoma?

A. A huge growth, huge mass.

Q. How large was it?

A. It extended from just below the navel clean down to the pubis.

Q. You mean five or six inches in diameter?

A. Well, I don't know the diameter, but one could see it and feel it there; a very large mass.

Q. In getting his history you used as simple language as you could, did you?

A. Well, I would have to ask him a good deal to get an answer out of him, to get him to reply.

Q. Because he didn't understand your English?

Mr. Eckert:

He didn't say that.

Mr. Meyer:

I am asking him; that is the question.

A. It seemed that I would have to explain what I wanted.

Q. It was difficult for you to make him understand English?

A. Yes, sir; at least, the way he answered, it seemed so.

Q. Well, did you ask him questions involving the word "rheumatism" or "syphilis"?

A. No, sir, I didn't ask only just a few questions.

Q. Did he tell you what was wrong with him?

A. Well, I would ask him, "Do you have pain?" and he would say yes, he had pain; and I would ask him how long he was sick, and he would say—he said four weeks, I believe he said he was sick. I asked him, "Did you lose weight?" and after a while he said yes; said he was weak. He seemed to understand.

Q. But you didn't use the names of any specific diseases or ailments, did you?

A. No, sir; I just asked about the duration and symptoms.

Mr. Eckert:

Q. Did he say how much weight he had lost?

A. He said he had lost fifteen pounds in four months.

Testimony of Dr. Heinz Langer.

Dr. Heinz Langer, a witness produced on behalf of defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Dr. Langer, you are practicing medicine in Pittsburgh now?

A. Yes.

Q. Of what schools are you a graduate?

A. University of Erlangen, Germany, and University of Pittsburgh.

Q. In what year did you graduate from the university in Germany?

A. 1915 Erlangen, and 1927 Pittsburgh.

Q. You are now on the staff of the West Penn Hospital?

A. Yes, sir.

Q. What is your capacity there?

A. I am the director of the Deep X-ray and Therapeutic Department.

Q. Did you administer any such treatments to Andy Adamos, or Andrew Adams?

A. Yes, I did.

Q. Between what dates, Doctor?

A. From the 27th of April, 1932, until the 11th of May.

Q. Were those treatments daily or otherwise?

A. There was a course of treatment from the 27th of April until the 29th, and then again from the 4th of May until the 11th of May.

Q. And when you say "a course of treatment", does that mean daily?

A. Yes.

Q. What is the nature of these therapeutic treatments?

A. In this case the alleviation of pain, giving a certain amount of X-ray over the tuberous masses and the spine, to relieve, if possible, the patient from pain and make him easier.

Q. About how long would each one of these treatments take?

A. Each application was approximately eight minutes. One hour,—he was in our department for approximately an hour, if I give all the fields.

Q. That is, you mean you would apply this X-ray for eight minutes?

A. Eight minutes for one particular spot and then I changed to give another field.

Q. So it took about one hour on each day?

A. Yes.

Q. Does the patient have to undress in order to take those treatments?

A. Yes, he has to.

The Court:

Q. Was this man a patient in the hospital?

A. Yes, your Honor, in the beginning he was a patient in the hospital.

Q. And continued until the 11th of May?

A. I don't know, for the second series which I mentioned; I don't know, I don't believe he was in the hospital.

Testimony of George L. Kiefer.

George L. Kiefer, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Mr. Kiefer, where do you live?

A. Aliquippa, 104 Moreland street.

Q. How long have you lived there?

A. Lived there about eight years.

Q. You are a druggist?

A. I am.

Q. How long have you been a druggist?

A. I have practiced pharmacy since 1920.

Q. Where?

A. In Aliquippa.

Q. Did your pharmacy fill Exhibit "F", being a prescription from Dr. B. T. Owens?

A. That was filled in our place of business.

Q. And did your pharmacy fill Exhibit "H", being a prescription from Dr. Andrew P. D'Zmura?

A. We filled that.

(No cross examination.)

Testimony of Frank M. Painter.

Frank M. Painter, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Mr. Painter, what is your profession?

A. Attorney at law.

Q. And how long have you been a member of this bar?

A. Since 1907.

Q. I believe you have charge of the workmen's compensation for the Jones & Laughlin Steel Corporation?

A. Yes.

Q. Do you know whether one Andrew Adams or Andy Adamos, was receiving workmen's compensation from the Jones & Laughlin Steel Corporation up until

the date of his death, on account of an accident sustained in the spring of 1926?

Mr. Meyer:

Just a minute. This is objected to, for the reason that the accident out of which this grew, concerning which this decedent was asked, if at all, occurred more than five years before the time when the policy was taken out or applied for.

Mr. Eckert:

The purpose of this testimony is this: The plaintiff takes the position in his reply that this accident back in 1926 had ceased to have any effect upon Andrew Adams. Now, we propose to show by this witness that Andy Adamos, or Andrew Adams, was collecting compensation from the Jones & Laughlin Steel Corporation for this accident right down to the date of his death, and that could only be done on assumption that he was still totally disabled during the time he was collecting that compensation. Therefore, we think this is some evidence that he had not recovered from the effects of that accident at the time of his death.

Mr. Meyer:

We are going to have to go into that whole issue then,—if you are going to start inferring things like that, because we will, first of all, have to determine what the accident was, what the law is, what the adjudication of the Workmen's Compensation Board was,—the whole question, if you are allowed to infer from this one fact, the fact

that he drew pay up until the time of his death, that he was still laboring under the effects of this accident that occurred away back. As a matter of fact, it is wholly immaterial, because it is outside of the period of five years that is in the policy.

Mr. Eckert:

No, there is another question which asks, without any length of time: "Have you ever been under observation in any hospital; have you ever undergone any surgical treatment; and what physicians, if any, have you consulted at any time for any ailment or causes not already mentioned?"

The Court:

Question No. 7 does not appear to be confined to the five year period.

Mr. Eckert:

There is none except the eleventh that is confined to the specific period of time.

The Court:

I think we will hear this testimony. We overrule your objection.

Mr. Meyer:

Note me an exception.

The Court:

We note you an exception.

Mr. Meyer:

I think I ought to object still further, because this particular matter, the question of his having

received compensation, is not alleged in the New Matter at all. If this is the only proof they have, I don't think your Honor can say there is *prima facie* evidence of this accident presented here. It certainly is not the best evidence unless they bring the whole record here.

The Court:

You are not proving the trial record of the Workmen's Compensation Board, which would be the judgment, I assume, which would entitle him to compensation,—in proving the fact that he was paid compensation for an injury. That is an item of evidence that I think might be given.

Mr. Eckert:

As your Honor knows, an employer has the right at any time to terminate the compensation on the ground that the man has ceased to be disabled.

Mr. Meyer:

But if he doesn't do it, that is not proof that he has not ceased.

The Court:

I don't know that you could predicate anything of any evidential value on that. The evidential fact, it seems to me, is that this man was receiving workmen's compensation up to the date of his death, if that happens to be the fact of the case.

Mr. Eckert:

Surely; that was the question that was asked.

Q. (Question read, as follows: Do you know whether one Andrew Adams, or Andy Adamos, was receiving workmen's compensation from the Jones & Laughlin Steel Corporation up until the date of his death, on account of an accident sustained in the spring of 1926?)

A. He received compensation up to and including May 31, 1932. I have another check to his order for compensation from June 1, 1932, to June 15, 1932, purporting to be signed by Andrew Adamos by mark, which was paid by the First National Bank at Pittsburgh on August 20, 1932.

Q. These other records with your company are signed with his name, are they?

A. Yes, except in a few instances; in the majority of instances he signed his name himself.

Q. And was that compensation, Mr. Painter, for total disability?

A. Yes.

Mr. Meyer:

That certainly is a leading question.

Cross Examination:

Mr. Meyer:

Q. Was it for total disability?

A. Yes.

Q. On what are you basing that statement?

A. On the reports that we received from our doctors, as the basis for making the payments.

Q. Was there a finding by the Workmen's Compensation Bureau on this case?

A. Yes.

Q. Was the case tried before the Workmen's Compensation Board?

A. Before a referee.

Q. Was there a trial, or did you folks make an agreement?

A. Yes; we offered to enter into an agreement, but the claimant preferred to present his claim to the referee, and there was a hearing and he was awarded compensation.

Q. Don't your records here show that the company had directed him to come back to work, and that he had gone back, and that that was done within six months or so before he died?

A. Not so far as I know. I think that about two years after his injury an effort was made to persuade him to return to work.

Q. And wasn't there an effort made in the spring of 1932 to get him to go back to work?

A. Not that I know of.

Q. Don't the records show that?

A. I very much doubt that, because my own observation of him would negative anything of the kind. (Witness refers to records.) No.

Testimony of John J. O'Neil.

John J. O'Neil, a witness produced on behalf of defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Mr. O'Neil, where do you live?

A. 140 Marshall avenue, North Side, Pittsburgh.

Q. How long have you lived in Pittsburgh?

A. Nine years.

Q. What is your occupation?

A. Cashier, New York Life Insurance Company.

Q. At the Pittsburgh branch office?

A. Yes.

Q. How long have you been cashier of a local office of the New York Life Insurance Company?

A. Eight and a half years.

(Four cards marked respectively Defendant's Exhibits "I", "J", "K" and "L"; and two papers marked respectively Defendant's Exhibits "M" and "N".)

Q. In your capacity as cashier, are you familiar with the records that are kept in the local office of the New York Life Insurance Company?

A. I am.

Q. Are the records pertaining to the date when policies are sent to the agent, or billed to the agent when the premiums are paid, and the like, kept under your supervision?

A. They are.

Q. I show you Exhibit "I", and ask you what that is?

Mr. Meyer:

Now, if your Honor please, this account shows on its face it is not with Andy Adamos at all, but a man by the name of Kalkstone; consequently I do not see any bearing this record can have on this case whatsoever.

Mr. Eckert:

No, you are wrong on this, Mr. Meyer. That is the name of the agent, naturally, and I think the witness will tell you that is the record of this policy.

The Court:

The witness may answer the question.

A. That is a record of policy on the life of Andy Adamos.

Q. What is the number of the policy?

A. 11,773,180.

Q. And what is Exhibit "J"?

A. That is a record of a policy on the life of Andy Adamos.

Q. What is the number of that policy?

A. 11,773,181.

Q. And what is Exhibit "K"?

A. It is a record of a policy on the life of Andy Adamos.

Q. What is the number of the policy to which that exhibit pertains?

A. 11,780,717.

Q. And what is Exhibit "L"?

A. That is a record of a policy on the life of Andy Adamos.

Q. What is the number of the policy to which that pertains?

A. 11,780,718.

Q. Now, these four exhibits, "I" to "L", both inclusive, constitute the records in the branch office pertaining to these four policies?

A. Yes.

Q. Do those records show when the premiums were paid on the policies?

Mr. Meyer:

That is the part of it that I am objecting to. They do not show whether that was the date when the premium was paid to the agent, who for collecting the premiums is the agent of the company; they do not show that at all.

Mr. Eckert:

We will follow it by showing the date on which the agent received the payment.

Mr. Meyer:

All they show is that was the date when the money came into this particular office here in Pittsburgh, not the New York office, and that is the reason I am objecting.

The Court:

I think he may answer the question.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

Q. (Question read.)

A. Yes.

Q. Do those records also show the date when the respective policies were mailed for delivery to the person upon whose life those policies were issued?

A. Yes.

Q. Now, referring to Exhibit "I," will you tell us when policy 11,773,180 was mailed to the agent for delivery to Andy Adamos?

A. April 14, 1932.

Q. Where are these policies all written?

A. In New York.

Q. New York City?

A. New York City, yes.

Q. And does the home office there then mail the policies to branch offices in Pittsburgh?

A. That is right.

Q. Who was the agent who placed this insurance?

A. S. Kalkstone.

Q. And where is his place of business?

A. McKeesport, Pennsylvania.

Q. So that it was on April 14, 1932, that you mailed policy No. 11,773,180 to Mr. Kalkstone from your Pittsburgh branch office. Is that right?

A. That is right.

Q. Now, referring to Exhibit "J", when was it mailed, policy No. 11,773,181, to Mr. Kalkstone, for delivery to Andy Adamos?

A. April 14, 1932.

Q. When did you mail policy No. 11,780,717 to Mr. Kalkstone?

A. April 20, 1932.

Q. When did you mail policy No. 11,780,718 to Mr. Kalkstone?

A. April 20, 1932.

Q. When did the Pittsburgh branch office receive the premium on policy 11,773,180?

Mr. Meyer:

Is that material, when the Pittsburgh branch office received it? It is when the agent received it —the agent in McKeesport.

Mr. Eckert:

Yes, but I think this helps to determine, together with the agent's testimony, just when the premium was received.

The Court:

We will hear it.

A. April 11, 1932—no; April 16, 1932.

Q. When was the premium received on policy No. 11,773,181?

A. April 16, 1932.

Q. When was the premium received on policy No. 11,780,717?

A. June 20, 1932.

Q. And when was the first premium received on policy No. 11,780,718?

A. June 20, 1932.

Q. I show you Exhibit "M", and ask you what that is?

A. That is a copy of the bill, billing this policy to the agent, S. Kalkstone.

Q. And what do you mean by the bill to the agent for this policy?

A. A form of invoice that we send to the agent when mailing him a policy.

Q. And what is the date when that bill was sent to the agent for those policies?

A. April 14, 1932.

Q. What policies were enclosed with that bill?

A. 11,773,180 and 11,773,181.

Q. I show you Exhibit "N", and ask you what that is?

A. That is a copy of the bill enclosing the policies to the agent.

Q. Which policies, Mr. O'Neil?

A. Policies Nos. 11,780,717 and 11,780,718.

Q. And when was that bill, with those two policies, sent to Mr. Kalkstone?

A. April 20, 1932.

Mr. Eckert:

We offer in evidence Exhibits "I" to "N", both inclusive.

Cross Examination:

Mr. Meyer:

Q. This date, June 20, for the payment of premium on policy 11,780,717, you don't know when the money was paid to the agent on that policy?

A. No, I do not.

Q. It might have been paid the day after you delivered the policies to him?

A. In all probability. I don't know the date he collected it.

Q. He might have collected that money a couple of months before he remitted it to your office?

A. Well, he couldn't very well have done that, when the policies were billed April 20. Of course, I don't know when he collected it.

Q. What is this note on these invoices here "Enclosed amendments to be duly executed before delivery of policies. Kindly note endorsement"? What does that mean?

A. That is a formal amendment that was sent out with these policies to the agent to have signed and return before delivering the policies.

Q. Then policy 11,773,181 has "Kindly note endorsement"?

A. That is endorsement on the photostatic copy of the application in the policy.

Q. You don't know anything about those endorsements?

A. No.

Q. Are these bills sent out under your supervision, the ones you have there before you?

A. Yes.

Testimony of Simon Kalkstone.

Simon Kalkstone, a witness produced on behalf of defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Mr. Kalkstone, where do you live?

A. McKeesport.

Q. How long have you lived there?

A. About thirty-two years.

Q. What is your business?

A. Real estate and insurance.

Q. Where?

A. In McKeesport.

Q. How long have you been in that business there?

A. For seven years now.

Q. Were you the agent who wrote this $20,000 of insurance on the life of Andy Adamos in April of 1932?

A. Yes, sir.

Q. Did you deliver each of those four policies to Andy Adamos?

A. Yes, sir.

Q. To him personally?

A. Yes, sir.

Q. And did you also collect the premiums from him personally?

A. Yes, sir.

Q. I show you Exhibit "O", and ask you what that is, if you know?

A. That is an application of the New York Life Insurance Company.

Q. And is that application signed by you?

A. Yes, sir.

Q. In the lower left-hand corner?

A. Yes, sir.

Q. And whose signature is that opposite yours, in the lower right-hand corner?

A. The man that I insured.

Q. Andy Adamos?

A. Yes, sir.

Q. Did you receive any premium with the signing of that application?

A. No, sir.

Q. And this form at the bottom, to be filled in when any premium is paid with the application, is left blank, is it?

A. Left blank, because he didn't pay me any money.

Q. When did you deliver policies Nos. 11,773,180 and 11,773,181 to Andy Adamos?

A. The 15th of April, 1932.

Q. Now, how do you arrive at that date?

A. The man paid me in cash at that time.

Q. Does your bank deposit book show the deposit of the premium collected that day?

A. Yes, sir.

Q. Have you that bank book with you?

A. I have it in my coat pocket. Shall I go and get it?

Q. Yes.

A. (Witness does so.)

Q. Would you just show his Honor the deposit of that premium?

A. (Witness submits bank book to the Court.)

Q. What was the date of that deposit, Mr. Kalkstone?

A. The 15th of April.

Q. Did you deliver those policies at the same time that you received payment for them, or on different dates?

A. No; the two of them the same day, the two policies the same day.

Q. That is, you mean you delivered policies 11,773,180 and 11,773,181 at the same time?

A. Yes, sir.

Q. And did you receive payment for those two policies at the same time?

A. Yes, sir.

Q. In other words, did you deliver those two policies and receive payment of the first premiums on them at the same time?

A. Yes, sir.

Q. And that was on April 15, 1932?

A. Yes, sir.

Q. Did you receive those two policies with a bill, of which Exhibit "M" is a true and correct copy?

A. Yes, sir.

Q. Do you have the original of that bill any longer?

A. No, sir.

Q. Have you searched your records for the original?

A. We throw them away; when I got them with the policies, I throw them away. I don't keep them at all.

Q. When did you pay the company the premium for those two policies?

A. The same day, mailed them a check.

Q. And does your check book show the drawing of that check that day?

A. No, it wouldn't show only these two policies, it would show other policies with it, because I paid for

other people too. It was paid that day, I have the checks here. I have looked them up, the other day, where the numbers appear on the check.

Q. Well, would you give us the check for the payment of the first premium on policies 11,773,180 and 11,773,181?

A. Yes, that is the check (handing same to counsel).

(Check marked Defendant's Exhibit "R".)

Q. Exhibit "R" is your check to the New York Life Insurance Company for the payment of the premium on those two policies?

A. Yes, sir.

Q. And that has the numbers of the policies on the back?

A. Yes, sir.

Q. When did you issue that check with reference to when you received the premium from Andy Adamos?

A. The same day.

Q. Is that your practice?

A. Sometimes the same day, sometimes the following day, if it is a cash settlement.

Q. Under what circumstances do you make payment the next day?

A. Well, sometimes it is too late to deposit it, or something like that,—too late to send a check to them, something like that.

Q. How much was the premium on each of these policies?

A. Well, five hundred and some odd dollars, less my commission.

Q. You mean, that is the premium for both policies?

A. Both policies.

Q. And your check to the company is simply for the net premium, after deducting your commission?

A. After deducting my commission, yes, sir.

Q. Now, when did you deliver the other two policies, 11,780,717 and 11,780,718, to Andy Adamos?

A. The latter part of May or the first part of June.

Q. Can you tell the exact date?

A. No, sir.

Q. Did you receive a statement similar to Exhibit "N" with those two policies?

A. Yes, sir; I received them with all policies.

Q. And did you keep the original of Exhibit "N"?

A. No, sir.

Q. Did you deliver those two policies, 11,780,717 and 11,780,718, at the same time?

A. At the same time, yes, sir.

Q. And when with reference to the date of delivery of those two polices, did you receive payment of the premium on those two policies?

A. Some cash the same time and two checks for later dates.

Q. You mean these checks were postdated?

A. Postdated.

Q. How much?

A. I don't recall how much.

Q. Well, I mean approximately how many days?

A. Oh, for about ten or twelve days; there were

two different dates on them. One was due five or six days and one due twelve or fourteen days, something like that.

Q. And what have you to fix the date when you delivered those last two policies to Andy Adamos and received payment of the premium on them?

A. Only by the payment to the company and then to go back ten or twelve days.

Q. And on what date did you pay the company for those two policies?

A. On the 17th of June.

Q. That is, it was the 17th of June, 1932, that you drew your check to the company?

A. Yes, sir.

(Check marked Defendant's Exhibit "S".)

Q. Is Exhibit "S" your check to the company to pay the net premium on policies 11,780,717 and 11,780,718?

A. Well, this one here—is that the first policy or the second policy?

Q. The second policy.

Mr. Meyer:

The third and fourth.

A. The third and fourth, yes, sir.

Q. And you wrote your check then as soon as you were sure these checks—

A. Were good, yes.

Q. You say those checks were not those of Andy Adamos but of some other party?

A. That is right.

Mr. Eckert:

We offer in evidence Exhibits "R" and "S"; also Exhibit "O".

Q. Did Andy Adamos, when you delivered any of these policies to him, tell you that he had had any ill health?

A. No, sir.

Q. Or that he had consulted any physicians?

A. No, sir.

Q. Or that he had been examined by any doctors or in any hospitals?

A. No, sir.

Q. I show you Exhibits "P" and "Q," and ask you if you know what they are?

A. Yes, sir.

Q. What is Exhibit "P"?

A. When an additional policy is ordered, one of these comes with the policy.

Q. In other words, then, Exhibit "P" is the supplemental application for policy No. 11,780,717. Is that right?

A. Yes, sir.

Q. Is that signed by you?

A. Yes, sir.

Q. As witnessing the signature of whom?

A. Andy Adamos.

Q. Did you see Andy Adamos sign that?

A. Yes, sir.

Q. And on what date did he sign Exhibit "P"?

A. Latter part of May or the first part of June.

Q. Was that at the same time that you delivered policy 11,780,717 to him?

A. Yes, sir.

Q. Was that signed by him on April 19, 1932?

A. No, sir.

Q. Was that date April 19, 1932, typewritten in there when you received that supplemental application?

A. It was.

Q. I show you Exhibit "Q", and ask you if that is the supplemental application for the next numbered policy, 11,780,718?

A. Yes, sir.

Q. Did Andy Adamos sign that in your presence?

A. Yes, sir.

Q. At the same time as Exhibit "P"?

A. That is right.

Q. And did he sign Exhibit "Q" then at the time when policy 11,780,718 was delivered to him?

A. Yes.

Q. Was that signed by Andy Adamos on April 19, 1932?

A. No, sir.

Q. That date is inserted at the home office?

A. The home office, yes sir. That is the way it came to me exactly; the only writing on there is the ink writing.

Mr. Eckert:

We offer in evidence Exhibits "P" and "Q".

Cross Examination:

Mr. Meyer:

Q. You received these two later policies about April 19th from the company, didn't you?

A. About the 21st, something like that—20th or 21st.

Q. 20th or 21st of April?

A. Yes, sir.

Q. And then did you get hold of Andy Adamos right away?

A. No, sir.

Q. What delayed you in getting him—not seeing him?

A. I couldn't find him.

Q. Had he before you got those two policies asked you to get him $10,000?

A. No, sir.

Q. He had not?

A. No, sir.

Q. How did you come to order two more policies?

A. Well, I figured I would be able to place them.

Q. You thought you would be able to persuade him to take them. Is that it?

A. Yes.

Q. When did you first meet Andy Adamos?

A. About two or three weeks before April 6th.

Q. And what was the occasion of your meeting him?

A. I met him in the restaurant.

Q. When did you first solicit him to take out insurance?

A. About two weeks before I got his application.

Q. You asked him to take out the insurance?

A. Yes, sir.

Q. And where was he at the time you talked to him?

A. In the restaurant.

Q. He didn't come to your office?

A. No, sir. He came later to the office to get—

Q. To get the policies?

A. No. I approached him in the restaurant to get the insurance, and I didn't get it at the same time, and about two weeks later he came up to the office.

Q. To talk to you about it?

A. Yes, sir.

Q. And did he then agree to take out this insurance?

A. Yes, sir.

Q. And when did this question of the second policy come up?

A. Well, I ordered the second policy with the first policy.

Q. You ordered it yourself?

A. Yes, sir.

Q. Without his telling you?

Q. And then after it came you talked to him and persuaded him to take the second policy?

A. Well, just as soon as I told him I got two of them, he agreed to take it immediately.

Q. And pay the premium?

A. And pay the premium.

Q. And then the same thing happened with the

four policies,— you talked to him about it, and he agreed to take them, if he could pay for them?

A. He told me he would pay for them, but he has to give notice to the bank to get this money.

Q. Did he come to your office on a stretcher when he came there for this insurance?

A. No, sir.

Q. He walked?

A. Walked.

Q. By himself?

A. By himself.

Q. And when you saw him in the restaurant, did you see him in his bedroom?

A. No, sir; it was right in the restaurant.

Q. He was going around?

A. No, he was sitting in a chair, at that time; when I talked to him, I sat right next to him.

Q. You didn't know him before your first meeting at all,—you didn't know who he was or anything about him?

A. No, sir.

Q. By the way, who told Mr. Adamos to go up to this doctor's office, Dr. Wiley's office?

A. I did, sir.

[illegible]

A. Yes, sir.

Q. Did you give him any papers to take with him when he went up?

A. No, sir.

Q. Were those papers already at the doctor's office?

A. The doctor has his own applications there.

That is, I only have these applications, and the doctor has the medical examinations; I don't have them at all.

Q. The doctor has the medical examination forms?

A. The forms in his office.

Q. And all you do is tell the man to go up there?

A. And he examines them.

Q. And then the doctor sends that report to you, does he?

A. No, sir; to the company.

Q. And you send the application in separately to the company?

A. Yes, sir.

Q. Now, about those other two policies, you have no memorandum of any kind that shows what date the money was paid for the two policies, the last two?

A. No, sir.

Q. No memorandum in your office of any kind?

A. No, sir.

Q. Don't you keep a day book or a diary, that shows exactly when money is paid in and when policies are delivered, and so on?

A. No; the only time I keep a record of the policies, when I put them in the book, is when they are issued, the date of birth, and that is all I do—keep a record of the man, that is all I do.

Q. You keep a record of his date of birth?

A. Keep a record of the date of birth.

Q. And when the policy is issued?

A. And when the application is made.

Q. What kind of book do you keep that in?

A. Regular ledger.

Q. Show me the entry you have in that book for Mr. Adamos.

A. (Witness indicates in book before him).

Q. You have just now called my attention to a page in a ledger account, in which you have some memoranda about the policy of Andy Adamos, and the only entries you have there are the numbers of the policies, the premium paid, and the date when the premium is due?

A. That is right.

Q. 4/8 means April 8, doesn't it?

A. Yes, sir, every year.

Q. These are all ordinary life policies, as shown by this book?

A. Yes, sir.

Re-direct Examination:

Mr. Eckert:

Q. Was all your conversation with Andy Adamos in English?

A. Yes, sir.

Q. You can't speak Greek?

A. No, sir.

Q. And you could understand him all right, and he could understand you?

A. Yes, sir.

Re-cross Examination:

Mr. Meyer:

Q. Now, just a minute about this talk. How well could you understand him? Did he talk plainly or brokenly?

A. Plainly,—not too fluently but enough to understand him.

Q. He didn't talk as well as you do?

A. No.

Q. He talked broken English, with a decided foreign accent?

A. Broken English, but I could understand every word he told me, and he could understand every word I told him.

Q. But you were only talking about life insurance?

A. Yes, sir.

Q. You didn't have any discussion about endowment policies, or anything of that kind?

A. No, sir.

Q. You just talked about straight life?

A. That is all.

Testimony of Dr. G. R. Welch.

Dr. G. R. Welch, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination:

Mr. Eckert:

Q. You are a graduate of a medical school?

A. I am.

Q. Which one, Doctor?

A. Medical College of the State of South Carolina.

Q. What is your present occupation?

A. Member of the medical board of the New York Life Insurance Company.

Q. And you held that position in April, 1932?

A. I did.

Q. I show you Exhibit "E," and ask you if that is the medical part of the application upon which policies 11,773,180, 11,773,181, 11,780,717 and 11,780,718 were based?

A. It is.

Q. Who was it that passed upon this application for the first two policies?

Mr. Meyer:

That is objected to, as irrelevant and immaterial. Whoever had anything to do with it in the company has nothing to do with this present situation legally, it seems to me.

Mr. Eckert:

We propose to prove that if the company had known the truth at the time it issued these four policies, it certainly would not have done so.

Mr. Meyer:

You mean, if the company had known he was suffering from carcinoma?

Mr. Eckert:

Yes.

Mr. Meyer:

I will admit that on the record, if necessary.

Mr. Eckert:

Furthermore, if it had been informed that this

man had been under observation in the St. Francis Hospital the preceding February, and had been examined by several doctors, treated by two or three of them, it would not have issued the policies without having obtained statements from those doctors as to what in their opinion was the cause of their treating the man, or what was the result of their examinations.

Mr. Meyer:

Of course I won't make any admission of that kind, because this man was not asked questions that he could understand about things of that sort.

The Court:

We will hear the evidence.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

Q. (Question read, as follows: Who was it that passed upon this application for the first two policies?)

A. One of the clerks in the home office.

Q. If any of these questions in Part 2 of the application had not been answered negatively, would that application have been referred to you?

A. It would have.

Q. And if, in answer to some of those questions, Andy Adamos had stated that he had been under observation in the St. Francis Hospital in the preced-

ing February, had been examined there by two doctors, and that he had been attended by Dr. Owens and Dr. Belinky, and some time before that by Dr. Spanos, what would you have done?

A. I would have requested statements concerning verifying the diagnoses.

Q. And if those doctors had then reported that they found, as Dr. D'Zmura and Dr. Davison testified, carcinoma of the prostate gland with metathesis to the surrounding structures, and extending perhaps even as far as the chest, would you have issued those two policies?

A. I would have declined to issue them.

Q. And if you had been informed by Dr. Owens of what he testified here this morning, would you have issued the policies?

A. I don't remember Dr. Owens' testimony.

Q. Well, assuming that Dr. Owens had told you that in December of 1931 he had been called to attend this man, and found him in bed, suffering pain in his abdomen, and had prescribed a sedative for him at that time, and then in February of 1932 had found him with increased weakness, also in bed, and with I believe a mass in his abdomen, would you have issued the policies?

A. I would not have.

Q. Who passed upon applications for policies 11,780,717 and 11,780,718?

A. I did.

Q. How does it come you passed on the second two, and not on the first two?

A. Because the amounts of over $10,000, it must come to a member of the medical board.

Q. And under $10,000, if the questions in Part 2 of the application are all answered in the negative, then it is not necessary that the application be referred to a member of the medical board. Is that it?

A. Yes, sir.

Q. If then, when the application came before you for the second two policies, increasing the amount to $20,000, you had been informed in any of these answers to the questions in the application, Exhibit "E," that Andy Adamos had in February, 1932, been under observation in the St. Francis Hospital for three days, that he had been examined there by two doctors, and had been treated or attended by three other doctors some time before that, would you have issued those two policies?

A. I would not have.

Q. What would you have done?

A. I would have wired the branch office to attempt to get the first two policies back, and declined the application for the additional $10,000.

Q. Did the company rely upon the negative answers to the questions in Exhibit "E," in issuing these four policies?

A. It did.

Cross Examination:

Mr. Meyer:

Q. What instructions were issued to Dr. Wiley, the representative of your company in McKeesport, to whom this application was referred, with respect to the extent of the physical examination which he should make?

A. He has to give a complete physical examination of the applicant and record his findings in the medical examiner's report.

Q. You don't mean complete physical examination, Doctor? There is no cardiograph made, for example?

A. That is a laboratory test; that is not a physical examination.

Q. It has to do with a man's physical condition; but you don't require a cardiograph except on very large policies?

A. That is right.

Q. All you ask for is a cursory external physical examination?

A. We expect a thorough physical examination.

Q. Thorough but external entirely?

A. Yes.

Q. Nothing symptomatic at all. They don't even take the temperature of an applicant, do they?

A. It is not taken unless it is indicated.

Q. Yes; unless it is so low they suspect there might be something wrong?

A. Yes; or above normal.

Q. And you don't even have in your form request or instructions to the medical examiner to state what the man's general appearance is, do you?

A. Yes.

Q. What question? Where?

A. Under Question 17 in the medical examiner's report.

Q. What does it say?

A. It says, "Applicant's general appearance? Healthy."

Q. And you don't require any examination of the retina of the eye—that is a special diagnosis, the scientific term of which I don't remember.

A. No, we don't require it in small amounts.

Q. What is the name of that?

A. Ophthalmoscopic examination.

Q. Opthalmoscopic examination,—you don't require that?

A. Not on small amounts, unless specially indicated.

Q. And where a system is followed such as was followed in this one, an application being made for $5,000, and then two policies being issued, in the hope that the agent could sell the second one, you don't make any difference in the procedure at all than you do when there is just a $5,000 policy, do you?

A. No.

Q. And there was no check-up at all by a doctor on the issuing of the second policy?

A. No; we don't require a second.

Q. And there was no fee paid to a doctor for making the second examination, for issuing that second policy?

A. No.

Q. Neither was there any fee paid to a doctor for the issuing of the third and fourth policies, was there?

A. No.

Q. You made no check-up whatever as to this man's physical condition after the application for the comparatively small sum of $5,000 was passed upon by the doctor?

A. Nothing except his statement that he had been in good health since the time of his examination.

Q. In the meantime?

A. Yes.

Q. Well, you don't have that for one of the policies—you don't have that for the second policy? You just have that for the third and fourth, don't you?

A. Yes, third and fourth, that is right.

Q. How do you expect an examining doctor,—You are a member of the medical staff of this company—How does your staff expect an examining doctor to be able to diagnose a condition of carcinoma of the prostate gland?

A. From the medical history.

Q. And only from a medical history?

A. Medical history and physical examination.

Q. And what provision is made for examination by the doctor of the applicant, where the applicant cannot speak English fluently, or cannot speak English at all?

A. The examiner is supposed to have an interpreter.

Q. Doesn't that blank there say that this must be made in the presence of no one else except the applicant and the doctor?

A. Yes, but it is an accepted rule,—it is done and accepted by the company.

Q. Now, where would that appear on that application, or that medical report?

Mr. Eckert:

If the Court please, I don't see that that is proper cross examination.

The Court:

I don't see what bearing that has on the issues here.

Mr. Meyer:

It does have on the testimony of various witnesses for the insurance company, that they were able to understand this man very poorly.

Mr. Eckert:

The agent said he understood him pretty well.

Mr. Meyer:

The doctors all said that he didn't.

The Court:

We sustain the objection.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

Q. Dr. Wiley testified here today that he himself made the urine analysis where the amount involved was less than $10,000. Was a urine analysis made by the medical cabinet of this applicant here?

A. No.

Q. How does it come it was not?

A. We don't require a home office specimen unless the amount is $25,000 or over.

Q. $25,000?

A. Yes; unless we have some special reason to call for it.

Q. It is common practice among insurance com-

panies other than yours to require the urine analysis to be made at the office of the company even for policies as low as $1,000?

Mr. Eckert:

Objected to, as not proper cross examination.

The Court:

We sustain the objection.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

Q. How long have you been with the company as a member of the medical board?

A. About three and a half years.

Q. And what did you do before that?

A. I was a commissioned officer in the United States Public Health Service.

Q. When did you graduate from the Medical College of South Carolina?

A. June, 1926.

Q. You are not licensed to practice medicine in Pennsylvania?

A. Not in Pennsylvania.

Q. Are you in New York?

A. I am.

Q. But you have never engaged in the general practice at all?

A. No.

Q. If you had been informed,—or Dr. Wiley in making this examination—in answer to the question

concerning previous accidents, had been informed that he had met with an accident six years before the application was made, what would the company have done?

A. With that information, I would have requested him to let us have full details concerning this accident, the nature of the injuries—

Q. From whom?

A. First from Dr. Wiley, to get the full medical history of the accident, the nature of the injuries, the treatment, and if there were any resulting effects of the original injuries.

Q. Just from Dr. Wiley,—you would not have verified that by getting the records of the hospital?

A. It would all depend upon the information given us by Dr. Wiley.

Q. Now, if this applicant had told Dr. Wiley, in answer to his question about medical treatment, that he had had some stomach trouble, pain in the abdomen,—I suppose this man would have said "belly"—what would you have done, or what would have happened?

A. I would have requested a statement from the doctor that attended him.

Q. Now, Doctor, you ask the question here on this form. "Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of A, B, C—B. The heart, blood vessels or lungs?" Now, a man has a cough and told the doctor he consulted a doctor for a cough, or bronchitis, would the doctor put that down, or is he expected to put that down?

A. Yes, sir; he is expected to put down each and every illness.

Q. Each and every illness. Whenever a man is in bed with a cold?

A. Yes, sir; chickenpox or anything.

Q. Chickenpox or whooping cough?

A. Yes.

Q. And you think the policy could have been voided, then, if a man had had whooping cough and had not reported that he had had it?

A. No, I wouldn't expect that; but we expect to have a complete medical history.

Q. Even to the extent of the different colds a fellows has had?

A. We are supposed to have it.

Q. Do you mean to say, Doctor, if a man has had three colds a winter for twenty years, he is supposed to report to this man each of those sixty colds?

A. It is part of the medical history.

Q. Did you ever see an application for a policy that had that number on?

A. Yes, occasionally, for colds.

Q. Occasionally—very rarely. Well, why don't you send each one back?

A. No, because each man should know.

Q. But you know it is false when he writes it in there?

A. No, I have no reason to know it is false.

Q. Did you ever know of anyone who never had a cold in his life?

A. I don't know.

Q. You don't know of anyone who never had a

cold, do you? Neither do the rest of us. Here is another one: "10. Have you ever consulted a physician or practitioner for any ailment or disease not included in the above answers?" I suppose if a man had consulted a physician for athlete's foot, you would expect it to be there?

A. That is part of his medical history.

Q. And you would expect a man to tell that? Don't you know, Doctor, as a matter of fact, if an applicant tells a doctor he has had athlete's foot, the doctor says, "that isn't the kind we want"—

Mr. Eckert:

I object to this, as not cross examination.

Mr. Meyer:

It is common practice.

The Court:

Well, what of it? We sustain the objection. We don't think it has any material bearing upon this case or tends to affect the credibility of this witness.

Q. In answer to Question 7-D: "Have you ever been found to have a high blood pressure?" how do you expect an applicant to answer that question?

A. If he had been told that he had a high blood pressure by a physician, I would expect him to answer it "Yes."

Q. Only if he had been told by a physician?

A. Yes.

Q. And in the next question, "Have you ever raised or spat blood?", of course there you mean habitually, not if he once coughed up some blood?

A. Well, if he once coughed it up, we would like to have that information.

Mr. Eckert:

We offer in evidence as Exhibit "T," the death certificate of Andy Adamos, or Andrew Adams.

DEFENDANT RESTS.

Mr. Meyer:

Reserving the right to present testimony in answer to the testimony presented by the defendant, counsel for plaintiff now moves the Court to dismiss the equitable defense presented by the defendant in its testimony in the hearing now being had, for the following reasons:

1. The defendant has not proved that the policy was secured by the decedent from the defendant by fraud on his part;

2. The defendant has not shown that the questions asked of the applicant, now the decedent, by the examining physician of the defendant were understood by the applicant; nor have they shown that the answers given were wilfully given falsely;

3. The defendant has not shown that there was wilful and intentional misrepresentation of any material fact on the part of the applicant, now the decedent, in making application to the company for the insurance upon which suit is brought;

4. The defendant, having shown that the applicant, now the decedent, was an ignorant,

illiterate man so far as his ability to understand and speak English is concerned, did not show, or has not shown, that any effort was made by the company or any of its agents to fully inform the applicant of the nature of the application which was made and signed by him, nor of the meaning of the questions asked him, nor of the result upon his beneficiaries if he, the applicant, made untrue statements to any of the questions asked him.

The Court:

We deny this motion.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

PLAINTIFF'S TESTIMONY.

Testimony of George A. Adamos.

George A. Adamos, the plaintiff, having been duly sworn, in his own behalf, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Your name is George Adamos?

A. Yes, sir.

Q. How old are you, George?

A. Thirty-three.

Q. Where do you live?

A. McKeesport.

Q. Where were you born?

A. In Greece.

Q. And what has been your last occupation?

A. Worked in the restaurant.

Q. Where?

A. McKeesport.

Q. You are a son of Andy Adamos, sometimes known as Andy Adams?

A. Yes, sir.

Q. And you are the beneficiary of the four policies upon which suit has been brought in this case?

A. Yes.

Q. When did you first learn that your father had taken out these policies?

A. About five days after he died.

Q. And when did you first discover that you were the beneficiary?

A. Five days after he died, we took these policies to my cousin and he explained all about it.

Q. You took them to your cousin?

A. My brother-in-law and I.

Q. Took them to your cousin?

A. Yes.

Q. Well, did you know anything about your father having taken out these policies at all before his death?

A. No.

Q. You didn't know he had taken them out at all?

A. No, sir.

Q. Where did you find these policies? Where were they in the house?

A. My father had them under his pillow, and some other papers together. And one night before he died he gave me this—he gave me an envelope; it was closed, sealed, and the rest of the papers—and my brother-in-law was present—and he told me to put them somewhere, and I put them in a trunk, and then we closed this trunk, and we didn't open it until, you know, four to five days after, you know, after he was dead.

Q. Do you remember when you took your father to the West Penn Hospital?

A. Yes.

Q. And do you remember taking him to Dr. D'Zmura?

A. Yes, sir.

Q. And to Dr. Spanos?

A. Yes, sir.

Q. Why did you take him to those doctors, George?

A. When we first called Dr. Owens in Aliquippa, Dr. Owens said that it was chronic appendix—

Q. Chronic appendix—chronic appendicitis, I suppose you mean.

A. Well, that is what he told us. I don't know what that means exactly; it was chronic appendix. So my father asked what was wrong with him. So Dr. Owens told me in the hall,—he didn't tell me, you know, in the presence of my father, he told me in the hall—there was a hall in there some place, and that is where Dr. Owens called me and told me it was chronic appendix. Of course, I didn't know what chronic appendix was. And my father asked what Dr. Owens

said was wrong with him, and I told him that Dr. Owens said that he had eaten something that upsets his stomach,—see? And then Dr. Owens gave us a medicine, and he told us to take this medicine, and if he gets all right,—I supposed he was going to be all right. So he took this medicine and a couple days later he was all right. He felt very good, and then he got up again. He only stayed in bed about a couple days, not quite two days.

Q. Then after that did he have this same trouble again?

A. Later on. Of course, I don't remember exactly how late it was,—I mean, you know, the next time.

Q. You don't remember exactly how soon the next time came?

A. Yes.

Q. Well, the doctor said he was there on the 11th of December and on the 28th of December, 1931. Does that sound about right to you?

A. I was there only once.

Q. At that time your father was living in Aliquippa?

A. When Dr. Owens examined my father I was in Aliquippa only once, the rest of the time I wasn't there,—I mean the rest of the two times I wasn't there.

Q. What is the name of your brother who was there?

A. My brother-in-law.

Q. Wasn't your father living with your brother in Aliquippa at that time?

A. My brother-in-law.

Q. Your brother-in-law,—what is his name?

A. Anastas Saris.

Q. Your father was staying at his home at that time in December, 1931?

A. December, 1931?—No; December, 1931, I think he was on Oakwood avenue; he was staying with a cousin of mine, Oakwood,—in other words, where he was examined the first time, you know, when I was there. I think it was 109 Oakwood.

Q. Then how did you come to take your father to the hospital? Who recommended taking him to the hospital?

A. Which one, which hospital?

Q. To the West Penn.

A. To the West Penn? My father was in McKeesport,—see—and he was in business there with a man that is here now, and one evening we went to a place and he had supper, and after his supper he just felt a little something, little pain,—I don't know how was it, but he said he wasn't feeling very good. So we thought it was a good idea to call Dr. Hadley. So we called him, and he asked me what was wrong with him,—I mean, if we had another doctor, if we had taken him to another doctor; and I told him yes. And he said what other doctors, and I told him that this D'Zmura said it was a cancer. And then Dr. Hadley said, "It looks to me like a cancer, too"—see. And then he told us, "Well, I will give you a letter and you take him to the West Penn Hospital to Dr. Langer, Heinz Langer." And then I took him there. I didn't know who Dr. Langer was, but I took him there, and then they took care of him. But the last time, the

time whenever he was taking his treatments, it was a young Italian fellow there, he was working with Dr. Langer, and of course he is the one who can tell if my father could walk, and everything about it,—see.

Q. Now, when you went to Dr. Langer at the West Penn, did you see Dr. Schildecker there?

A. Yes. I saw Dr. Schildecker, but I didn't know. They told me it was Dr. Schildecker was taking care of him, but I don't know who Dr. Schildecker was, and there was a couple doctors in there. This here—what you call it?—

Q. Davison?

A. No,—this fellow all dressed up in white, what you call him?

Q. Oh, an orderly, you mean—or interne?

A. An interne.

Q. And there was an interne there,—I see. Well, did you talk to Dr. Schildecker about your father's condition?

A. Dr. Schildecker?

Q. Yes, in the West Penn Hospital.

A. Somebody, one,—I don't know who he was.

Q. Did you talk to Dr. Schildecker yourself?

A. I don't remember.

Q. Did anyone in the West Penn Hospital tell you personally that your father—

A. I don't know who Dr. Schildecker is.

Q. Didn't you see him on the witness stand this morning?

A. I saw him, yes, a couple of them. I saw Dr. Schildecker and—who was the other man? Dr. Davison,—he was from another hospital.

Q. Well, did either of these men tell you what was wrong with your father—tell you yourself what was wrong with your father?

A. Yes, they told me.

Q. And what did they tell you it was?

A. They told me it looked like cancer.

Q. Did you tell your father what they said was wrong?

A. No, I couldn't say it.

Q. You didn't tell your father what they told you?

A. I couldn't say anything like that to my father.

Q. Why not?

A. It was cancer—I don't know.

Q. Well, did you tell your father it was cancer?

A. No, I didn't say anything to him.

Q. Now, your father knew Dr. Spanos in February, 1932, didn't he? Dr. Spanos is the Greek doctor.

A. The Greek doctor, yes, my father and I went there once, I remember, once or twice; I don't remember well.

Q. And then Dr. Spanos recommended that your father go to Dr. D'Zmura at St. Francis?

A. At St. Francis, yes.

Q. And did Dr. D'Zmura tell you that he thought your father had a cancer?

A. Yes.

Q. Did you tell your father that the doctor said he had cancer?

A. If he told my father?

Q. Did you tell your father?

A. No, sir.

Q. Now, what was your father's appearance, general appearance, George, during this winter of 1932,—January, February, March and April of 1932? Did he look like a sick man or did he look as he always had?

A. No, he didn't look like a sick man.

Q. Had he lost weight?—What did you say?

A. My father was a man that he was always thin, he weighed about 140 pounds, 145, 150 sometimes. He was just going up and down.

Q. How did his weight compare with your weight, as you are now?

A. Oh, he was not as heavy as I am.

Q. Not as heavy?

A. No.

Q. How much do you weigh now?

A. Oh, I don't know.

Q. Had he ever been as heavy as you are now?

A. No.

Q. Now, when your father had these attacks of pain in the stomach, did you ever see him when he had one of these attacks of pain?

A. If I ever saw my father?

Q. Did you ever see your father when he had a pain in his stomach, or the abdomen—You know what is meant by the abdomen, don't you?

A. No.

Q. Well, the abdomen is the portion below the lungs,—it is the belly. Did you ever see your father with a pain in that region?

A. If I ever saw the pain?

Q. No. Were you ever around near your father when he said that he had a pain in his abdomen?

A. Well, he was—you know, the time whenever he had—the time whenever he had that pain, you know—That is why he went to these here doctors. He told me, you know, he was feeling kind of—you know, he wasn't feeling right, it wasn't—you know, severe pain, what you call, but it was just slight pain like.

Q. Did you ever hear him complain about having to urinate frequently, pass water frequently?

A. If he told me?

Q. Yes.

A. No.

Q. When did your father finally take to bed and never get up again?

A. Three weeks before he died.

Q. Three weeks before he died?

A. Yes, sir; I don't remember if it was quite three weeks.

Q. And before that had he made any plans about traveling?

A. Oh, he was thinking about—once he was thinking about going up to the farm and stay there for a while, my cousin's farm; and then he was thinking about taking a trip over home, and go over there. He had a little property over there; he was thinking about going over there and selling the property and coming back again.

Q. You mean, over to Greece?

A. Yes.

Q. And what did he do about going to Greece?

A. What did he do?

Q. Yes. Did he make any arrangement at all?

A. Well, he had some overalls—

Q. But did he make any arrangements about getting a passport? Did your father get a passport to go to Greece?

A. If he got one?

Q. Yes; did he get a passport that summer to go to Greece?

A. I think he got one.

Mr. Eckert:

Q. If you know of your own knowledge, now.

A. Well, he was thinking about getting one,—see. He was thinking about getting one, you know, getting a passport.

Mr. Meyer:

Q. Where was he staying during the summer, April, May and June of 1932? Where did he live?

A. 1932, April?

Q. Yes; where did he live in April?

A. McKeesport.

Q. And where did he live in May?

A. McKeesport.

Q. And where did he live in June?

A. Well, at first, the first days of June he was in McKeesport.

Q. The first part of June?

A. Yes.

Q. Do you remember when it was he went to Aliquippa?

A. The day?

Q. Yes.

A. No.

Q. Or do you remember what part of June it was he went to Aliquippa?

A. I don't remember. At the time when he was in McKeesport, he used to go to Woodlawn, to Aliquippa, once in a while.

Q. He used to go to Woodlawn once in a while?

A. Yes; once or twice every week.

Q. To Woodlawn? You mean Aliquippa, don't you?

A. Yes; it is the same thing.

Q. And he went there during the time he lived in McKeesport once or twice a week?

A. Yes.

Q. How would he travel?

A. By train and street car.

Q. And he was able to travel, was he, during April and May?

A. Sure.

Q. And how frequently did you see him during the months of April, May and the first part of June? How often did you see him yourself?

A. Every day. Of course, you know, the time whenever he was in Aliquippa, and I wasn't with him, I didn't see him.

Q. And shortly after he went to Aliquippa he got sick and took to his bed, didn't he?

A. The time when he went to Aliquippa, the last days?

Q. Yes.

A. Yes.

Q. That was about the middle of June he took sick?

A. Well, I don't remember exactly, but it was some time.

Q. And after he took sick, how often did you see him?

A. In Aliquippa, after he was sick?

Q. Yes.

A. I was there almost every day,—not every day, but a couple of days every week.

Q. When did you come to America, George?

A. This is my third trip here.

Q. Are you a naturalized citizen?

A. Yes, sir.

Q. And you say this is your third trip here?

A. Yes.

Q. How old were you when you came the first time?

A. The first time I was around fifteen, sixteen years old.

Q. Did you come over with your father?

A. No.

Q. Was he here at that time?

A. He was here, but he went back again and come back. He had two or three trips. He had three trips himself.

Q. He had three trips across, from Greece to America?

A. Yes.

Q. And during the time that he was here in America, what kind of work did he do?

A. What kind of work?

Q. Yes.

A. He used to work in the mills as a painter, and then the time whenever he was hurt in Aliquippa—it was a couple years after he was in partnership with my cousin Adam Adams, in Liberty Restaurant, Aliquippa, and then he work there for I don't remember how long, but he work there, you know, he was helping in the kitchen there. And then he was there, I don't know exactly how long, you know, in partnership with my cousin, I can't tell you exactly how long, and then later on, you know, he came to McKeesport.

Q. Now, during the time that he was working, did he work with Americans or with people of other nationalities?

A. He work with Greeks, you know—

Q. Principally with Greeks?

A. Yes.

Q. Could your father talk English as well as you are talking it here now?

A. No, sir.

Q. Did he ever learn to talk English well—your father?

A. No; he just talked,—I don't know—broken; broken talk.

Q. Could your father read the Greek language?

A. Yes.

Q. He had some education, had he?

A. Yes; not very much education, but a little bit.

Q. He could read Greek?

A. Yes.

Q. Could he write?

A. Yes.

Q. Could he read or write English?

A. No.

Q. I suppose he could count American money?

A. How is that?

Q. I suppose he could count American money?

A. Oh, yes.

Q. Did you go to school in this country?

A. No.

Q. Where did you learn to talk English?

A. In this country.

Q. Just by talking to people in this country?

A. Yes, sir.

Q. Can you read English, too?

A. Yes, but I didn't take up English in this country; I took it up over home.

Q. Well, can you read a newspaper now in the English?

A. A little.

Q. And of course, you can write your name, write some in English?

A. Yes.

Q. Can you read and write the Greek language?

A. Yes, sir.

Q. What education did you have in the Greek schools? Was it equivalent to our common schools or to our high schools?

A. I went as far as high school.

Q. You went to the high school?

A. Not through.

Q. Did you go through the high school?

A. No.

Cross Examination:

Mr. Meyer:

Q. How long was your father in this country?

A. How long?—You mean the last trip?

Q. In all?

A. Oh, around thirty years.

Q. How old was he when he came to this country the first time?

A. I can't tell you.

Q. Well, didn't you swear in the reply that he was between fifteen and twenty years of age when he migrated to American?

A. Well, I can't tell you exactly. He was young fellow, I know. That is the only thing I can tell you.

Q. Well, was he between fifteen and twenty years of age when he first came to America?

A. Yes.

Q. And how many times did he return to Greece after he came here the first time?

A. Three times.

Q. How long did he stay each time?

A. Over there?

Q. Yes.

A. Once,—I can't tell you exactly how long, but a couple of years; every time two or three years.

Q. When was the last time that he came to America?

A. The last time, it was some time in 1913.

Q. Then he was continuously in this country from 1913 until he died?

A. Yes.

Q. Did he go to Woodlawn by himself and back again to McKeesport?

A. Did he go to Woodlawn by himself?

Q. On these trips that he made, as you say, to Aliquippa, would he go by himself?

A. Yes.

Q. And went to McKeesport by himself?

A. Yes, sir. You mean all this time?

The Court:

Your questions are a bit confusing, Mr. Eckert. I think you ought to confine it, if you are meaning the time this witness testified about in chief, to the spring of the year 1932. You ought to mention that fact.

Q. I mean, could your father go by himself to Aliquippa and back to McKeesport, say, from 1913 until 1932?

Mr. Meyer:

That is objected to, as not proper cross examination.

The Court:

Well, that goes beyond the scope of any testimony that the plaintiff is called upon to answer. The only thing that you charge having to do with the years 1926 on is when he first went to the hospital, with this accident; and in 1931, when the physicians were called to testify.

Q. Well, say, from 1926 up to and including 1931.

A. In 1926 he was hurt in the mill and he was taken up to the South Side Hospital.

Q. Well, after he was able to get around again, after that—

A. A couple of years after, yes.

Q. All right; between 1928 and 1931, was your father able to go to Aliquippa and back to McKeesport?

A. Yes, sir.

Q. By himself?

A. Yes, sir.

Q. And was he able to get about McKeesport and Aliquippa by himself during those years?

A. You mean, for how long?

Q. Between 1928 and 1931. Was he able to go around Aliquippa and McKeesport by himself?

A. Yes.

Q. And attend to his business?

A. In McKeesport?— Everywhere, you mean?

Q. Wherever his business was.

A. Yes.

Testimony of Emanuel Tsivits.

Emanuel Tsivits, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. What is your full name?

A. Emanuel Tsivits.

Q. And where do you live?

A. McKeesport.

Q. What is your present business?

A. 562 Fifth avenue.

Q. What do you do there?

A. Cleaners, cleaning.

Q. Cleaning what?

A. Suits and hats.

Q. How old are you?

A. Thirty-eight.

Q. How long have you lived in America?

A. About seventeen years.

Q. What country did you come from?

A. Island of Ross.

Q. What is your native tongue? What is your native language? What country did you come from—Greece, you say?

A. It belong to Italy now, you see. It was Greece, and then Italy.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Married or single?

A. Married.

Q. Have any children?

A. Yes, sir; one.

Q. Did you know Andy Adamos in his lifetime?

A. Yes, sir; I have been here in Pittsburgh working down at Kaufmann & Baer's, before Gimbel buy it out,—see—from 1920 to 1929, nine years. So I happened to know that man, he was coming to the foreign department, making his purchases, and of course I was interpreter for the house—

Q. You were an interpreter, you say?

A. Yes. He was not speaking so good English, you know.

Q. Now, wait. You knew him while you worked at Kaufmann & Baer's store?

A. Yes, sir.

Q. And you left there in 1929?

A. Yes, sir.

Q. Have you known him since that?

A. Well, I saw him once in McKeesport, after he came over there to start in business; but a couple of times since I saw him.

Q. Did you talk to him when you saw him?

A. Yes.

Q. And in what language did you talk to him?

A. His native tongue, Greek.

Q. Why didn't you speak English?

A. Why, he wasn't able to talk very good English.

Q. And when you talked to him in Gimbel's store, what language did you use?

A. Greek.

Q. And why did you use Greek?

A. Of course, I was using Greek language to the Greeks, and the Italian to the Italians. And of course he was a Greek, that is why he came to me.

Q. Were you able to talk to him in English when he came to you in Gimbel's store?

A. Well, sometimes when he was making his buying, you know, these purchases, he was talking to the girl, you know, but not very good; that is why he come to the office of the foreign department.

Q. So that he could understand?

A. Yes.

Q. This is a question that was asked Mr. Adamos: "Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of: A. The brain or nervous system?" In your opinion, if that question had been asked Andy Adamos on April 6, 1932, or had been read to him as I have now read it to you, would Andy Adamos have understood the question that was then read to him?

Mr. Eckert:

Objected to, as incompetent, irrelevant and immaterial.

The Court:

We sustain the objection.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception.

Q. Did Andy Adamos know the meaning of the words "rheumatism, gout or syphilis"?

Mr. Eckert:

If he knows.

Q If you know.

A. Why, it seems to be rheumatism,—that is a Greek word, real Greek word; and the "syphilis" also is a Greek word; but I don't know about—

Q. What about "gout"? Is that a Greek word?

A. What kind?

Q. "Gout".

A. I don't think that is a Greek word.

Q. Do you know yourself what is meant by the word "gout", the English word "gout"?

A. No, I don't know what it means.

Q. But "rheumatism" and "syphilis", you say, are words that would be understood?

A. Yes, he is able to understand that.

Q. Would Andy Adamos have understood the words "physician or practitioner"?

A. Well, it seems to be a pretty heavy word, a hard word for him to understand.

Q. You think it would have been pretty hard for him. Would he have understood the words "Have you consulted or been examined by a physician"? Would he have understood that?

A. I don't know if he would have understood it or not.

Mr. Eckert:

I object to this, as incompetent, irrelevant and immaterial.

The Court:

We sustain the objection.

Mr. Meyer:

Note an exception, please.

The Court:

We note you an exception.

(No cross examination.)

Testimony of Ignatius Alexandritis.

Ignatius Alexandritis, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Where do you live, Mr. Alexandritis?

A. McKeesport.

Q. Whereabouts? What is your address?

A. My address, 1206.

Q. 1206 what?

A. Royal street.

Q. How old are you?

A. Sixty.

Q. How long have you been living in America?

A. Thirteen.

Q. Thirteen what?

A. Thirteen years.

Q. What is your business? What do you do for a living?

A. Cook.

Q. Did you know Andy Adamos?

A. Yes, sir.

Q. How long did you know him?

A. Ten years.

Q. How well did you know him? How often did you see him?

A. I saw him sometimes in the street, that is all.

Q. You saw him in the street where?

A. At the store, he come over there sometime.

Q. What store?

A. Lunch.

Q. At the lunch store. Did you ever hear Andy Adamos talking English?

A. Not talk very much,—like me.

Q. Like you?

A. Yes.

Q. How did you talk to him?

A. I talked in Greek.

(Adjourned until Tuesday, October 24, 1933, at 10:00 o'clock A. M.)

Tuesday, October 24, 1933.

MORNING SESSION:

Testimony of C. B. Ranson.

C. B. Ranson, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Your name is C. B. Ranson?

A. Yes, sir.

Q. Where do you live, Mr. Ranson?

A. Aliquippa.

Q. And what is your age?

A. Forty-nine.

Q. And what is your present occupation?

A. Chief of the fire department.

Q. How long have you been chief of the fire department?

A. Over twenty-one years.

Q. Did you know Andy Adamos, or Andy Adams, in his lifetime?

A. Yes, sir.

Q. How many years did you know him?

A. Between eight and ten years.

Q. And what was the occasion of your being acquainted with him?

A. Why, his relative—nephew, I believe it is—runs the Liberty Restaurant there, and he used to go back and forth; and he lived right back of the fire department, on the hill there, and in going back and forth to his work he passed the fire department, and in that way I got acquainted with him.

Q. And how frequently did you see him and talk to him?

A. Oh, I seen him probably once or twice a week, but I didn't talk to him every time.

Q. How many times did you talk to him in the years you knew him?

A. Oh, I couldn't say how many times; but I saw him several times.

Q. Was it a considerable number of times?

A. Yes; I would say the average casual acquaintance.

Q. Did you talk to him in English?

A. Yes, sir.

Q. Can you talk Greek?

A. Me?—No, sir.

Q. And what would you say about the manner in which Mr. Adamos talked English?

A. Broken English, what we would call broken English.

Q. And by that what do you mean, Mr. Ranson?

A. Why, it was very hard to understand, and he wouldn't phrase a full sentence very often; it was more just a word now and then.

Q. And did you have any difficulty in making him understand you?

A. Yes.

Q. And what were you talking about when you were talking?

A. Well, sometimes it would be how hard it was for him to get down off the hill. He had to come down quite a steep hill there. And other times I would ask him how he was feeling, and he would say "No good" or "Not so good"; and further questioning, you know, he would get all tangled up in what he would try to tell me.

Q. During part of this time, I believe he was crippled and had difficulty walking?

A. Yes, sir; he had been injured in the mill.

Q. He had been injured in the mill there in Aliquippa?

A. Yes, sir.

Q. Do you know whether he could read and write the English language?

A. No, I do not.

(No cross examination.)

Testimony of Gust Facaris.

Gust Facaris, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Where do you live?

A. Aliquippa.

Q. How old a man are you?

A. About thirty-eight.

Q. And what nationality are you?

A. Greek.

Q. When did you come to America?

A. In 1913.

Q. And what is your present occupation?

A. Merchant—butcher, grocer.

Q. Where is your place of business in Aliquippa?

A. Kiehl street—K-i-e-h-l.

Q. How long have you lived in Aliquippa?

A. Oh, about nineteen years.

Q. Did you know Andy Adamos in his lifetime?

A. Yes.

Q. How long did you know him?

A. Oh, I know him about eleven years,—something like that, ten or eleven years.

Q. And how did you come to know him?

A. Well, you see, I had a place of business, and he would come to my place, that is where I got to know him.

Q. He came there as a customer?

A. Yes.

Q. Did you ever talk to him?

A. Oh, yes, I talk to everybody that come to my place.

Q. Well, did you talk to him?

A. Yes.

Q. What language did you use in talking to him?

A. Of course, I talk to him in Greek, you know.

Q. Did you ever try to talk to him in English?

A. Oh, I went sometimes with him, and I had to do something to help him out, because he talk broken English.

Q. And did you act as interpreter in these places?

A. Sometimes, yes; postoffice or some stores.

Q. Do you know whether or not Andy could read and write English?

A. Oh, I know he could write his name; of course a lot of times I cashed a check for him, his compensation check.

Q. Well, could he read English? Could he read a newspaper?

A. Oh, I don't think he could read a newspaper, but I know he could write his name in English.

Q. And when he was talking to other people in English, did he have any difficulty in understanding them?

A. Well, you see, he couldn't talk very good English; you know, he talk some broken English.

Q. But could he understand what English people were saying to him in English?

A. Oh, yes, I suppose he could understand some, he couldn't understand all maybe; I don't know about that.

Q. And you had to do some interpreting for him?

A. Sometimes in the stores, he wants to do shopping, and he couldn't talk very good, and I went with him.

Q. You went with him to stores, you say?

A. Sometimes, yes; and sometimes to the post office, and sometimes to stores, you know.

Q. And you went with him as interpreter. That is all.

(No cross examination.)

Ignatius Alexandritis—Resumed.

Ignatius Alexandritis resumes the stand.

Direct Examination (Continued):

Mr. Meyer:

Q. Mr. Alexandritis, did you ever hear Andy Adamos talk in English?

A. No, sir.

Q. Did you say you did not?

A. I know him, but I never see him talk English.

Q. You never heard him talking English?

A. No, sir.

Q. Were you ever present when other people were talking to him in English?

A. I never hear him talking English to somebody; sometimes they talk it, but I don't do much.

Q. I don't think you understand my question. Were you ever there when somebody was talking to Andy in English?

A. Yes, sir.

Q. Did Mr. Adamos understand the English that this man was using?

A. Not understand everything.

Q. And how did he find out what the man was saying to him in English?

A. What do you say?

Q. How did Andy find out what the man was saying to him in English?

A. Sometimes he talk, you know; he might hear him and he wouldn't understand.

Q. He wouldn't understand?

A. Yes, sir.

Q. Well, would you understand the English?

A. Not too much; a little bit.

Q. Well, when this man was talking English, did you tell Andy what the English meant?

A. Yes, sir.

Q. Could Andy talk English as well as you talk English?

A. A little bit, that is all, not too much.

Q. Well, could Andy Adamos talk English as well as you talk it?

A. Yes.

Q. He could?

A. Yes, sir.

Q. Did Andy Adamos know what the word "insurance" meant?

A. No, I don't know it.

Q. You don't know?

A. No.

Q. Did Andy Adamos understand what the word "physician" or the word "practitioner" meant?

A. I don't know.

Q. Well, do you know what they mean?

A. Yes.

Q. Do you know what the word "physician" means?

A. I no versteh, no.

Q. Do you know what the word "practitioner" means?

A. No.

Q. Do you know what the word "rheumatism" means?

A. Why, I know.

Q. What is it?

A. I hear it, sometimes I am a little bit sick; I don't know it.

Q. You don't know what?

The Court:

He said he heard it some time when he was sick, but he didn't know what it was about.

Q. Do you know what the word "gout" means?

A. No.

Q. Do you know what the word "syphilis" means?

A. Why, yes.

Q. Did Andy Adamos know what the two words "prostate gland" meant?

A. I don't know.

Q. Do you know?

A. I don't know.

Q. Do you know what the prostate gland is?

A. No.

Q. Do you know what the kidney is?

A. Why, yes.

Q. Do you know what the word "intestines" means?

A. No, I don't know.

Q. Do you know what the word "albumin" means?

A. (Witness does not answer.)

Q. Did Andy Adamos know what the word "albumin" means?

A. No, I don't know that.

Q. Well, did Andy know what the word means?

The Court:

He said: "No, I don't know that."

A. No, I no versteh that.

Q. You don't understand that, I see. Do you know what the expression "surgical operation" means?

A. Yes, sir.

Q. What is a surgical operation?

A. Excuse me; me no versteh that.

Q. You don't understand that?

A. No; pardon me, I don't know.

Q. Do you know what the word "accident" means?

A. No, sir.

Q. Don't you know what the word "accident" means?

A. No.

Q. Did Andy Adamos know what the word "accident" means?

A. I don't know that.

Q. Do you know what the expression "high blood pressure" means?

A. No, sir; me no versteh.

Q. You know what "blood" is, don't you—the word "blood"?

A. Oh, yes.

Q. Well, do you know what "blood pressure" is?

A. No.

(No cross examination.)

Mr. Meyer:

If the Court please, yesterday afternoon—I didn't say anything about it at the time, as I possibly should have—Mr. Kalkstone left the court room while I was looking af my papers here, and was gone out of the building before I had a chance to call him back to ask him some further questions; and I would ask to call him back for further cross examination. When he went down here off the stand, nothing was said about leaving, and I didn't understand all his witnesses were leaving the court room without any consultation with counsel. There are a couple more questions I would like to ask him.

The Court:

I don't know of any way you can get him back here now, unless you subpoena him and continue the case, and I don't see any basis for that, Mr. Meyer.

Mr. Meyer:

He is here now, Your Honor.

Mr. Eckert:

He is here now, but it seems to me they ought to call him as their witness.

The Court:

We will let him call him for further cross examination.

Simon Kalkstone—Recalled.

Simon Kalkstone, recalled for further cross examination, testified as follows:

Cross Examination (Cont.):

Mr. Meyer:

Q. Mr. Kalkstone, I call your attention to Defendant's Exhibit "Q", supplemental application for insurance. You testified yesterday with respect to that paper that Andy Adamos signed that in your presence, and I think you said it was on the 21st or 22nd of April, and not the 19th of April, as appears there?

A. No, sir, I did not say that.

Q. What was it you said?

A. I said he signed that paper the latter part of May or the first part of June; that is exactly when he signed it.

Q. Oh, I see. And you said that date, "April 19", was on the paper when you got it?

A. Yes. That is the way they all come, yes, sir.

Q. And it was actually delivered, this one, the latter part of May or the early part of June?

A. This paper, or the policies, you are talking about?

Q. No, I am talking about this paper, Exhibit "Q".

A. Yes, sir.

Q. It was delivered to Mr. Adamos the latter part of May or early part of June?

A. That is right.

Q. When he paid the premium, some cash and some postdated checks?

A. That is right.

Q. And the same thing applies to this paper, Exhibit "P"?

A. Both the same type.

Q. Now, at the time you had him sign this paper, what conversation did you have with him with respect to this paper?

A. At that particular time he also signed changing the beneficiary to his son, at the same time—I had quite a talk—

Q. I see.—That was another paper?

Mr. Eckert:

Well, let him answer.

Q. I didn't mean to interrupt. Were you going to say something else? You said you had quite a talk with him?

A. Yes.

Q. And this paper changing the beneficiary was another paper than either of these exhibits?

A. Yes.

Q. And you say you had quite a talk with him?

A. Yes, sir, a lengthy talk.

Q. And what was his general appearance that day? Did he look to be a well man?

A. Fair.

Q. Did he look any different than he had looked when you talked to him in April?

A. Well, about the same.

Q. You are not a doctor, are you?

A. No; about the same.

Q. And when he signed this paper, Exhibit "Q", and the other paper, Exhibit "P", what if anything did you say to him about signing these papers? Did you tell him anything about what the papers were?

A. Yes; I told him that is a receipt for the new policies, that he have to sign that, to send it back to the company.

Q. Did you tell him it was a receipt or an application?

A. No, this is not an application. That is a receipt showing he received the second policies.

Q. And you told him these were receipts?

A. Told him he would have to sign them, because he asked me why he has to sign these.

Q. And did you say anything to him about this paper having a provision in it, or having a statement in it, that there had been no change in his health from the time he made the application before?

A. I did not.

Q. You didn't say anything about that?

A. No, sir.

Q. And all your conversation with him at the time you had him sign these papers, Exhibits "P" and "Q", was in the English language?

A. English, always English.

Q. And Mr. Adamos couldn't read English, could he?

A. Well, I don't know that.

Q. You don't know that?

A. No, sir.

Q. Did he make any attempt to read this paper, Exhibit "Q", before he signed it?

A. No; I told him what it was.

Q. You told him what it was, and then he sat down and signed it?

A. Yes, sir.

Q. Without reading it?

A. Yes, sir.

Re-direct Examination (Continued):

Mr. Eckert:

Q. If he had wanted to, could he have gotten somebody to translate these two supplemental applications, Exhibits "P" and "Q", into the Greek language for him?

Mr. Meyer:

I object to that, as immaterial.

The Court:

I don't know that we would be helped out by the answer of this witness to that question. It is almost a self-evident fact that if he wanted it translated, he could have had it done.

Q. In other words, you didn't undertake to prevent him from learning the contents of Exhibits "P" and "Q"?

A. Oh, I gave it to him, and he looked at it; possibly he read it.

Q. I say you didn't prevent him from getting an interpreter to translate it to him, if that was necessary for him, did you?

A. No, sir.

Q. Did you read the contents of Exhibits "P" and "Q" to Andy at that time?

A. No, sir.

Q. Did you call these things supplemental applications or receipts?

A. I told him, "When you get another policy, you have to sign one of these papers." He asked me what it was, and I told him what it was. If I had read that paper to him, he would have understood me.

Q. And just what did you tell him then that these two papers, Exhibits "P" and "Q", were?

A. I told him these two papers were, that the company sends a paper with each policy for additional insurance, and that these papers have to be signed. He didn't want to sign them, and I told him they have to be signed, because I have to return them to the company.

Testimony of Christ Petos.

Christ Petos, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Your name is Christ Petos?

A. Yes, sir.

Q. Where do you live?

A. McKeesport.

Q. How old are you?

A. Thirty-nine.

Q. What is your present occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. Oh, about five or six years.

Q. How long have you lived in America?

A. About fifteen years.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. What country did you come from to America?

A. Greece.

Q. Did you know Andy Adamos in his lifetime?

A. Yes.

Q. How long did you know him preceding his death?

A. About seven years.

Q. How well did you know him? How often did you see him in the seven years?

A. I see him in McKeesport.

Q. You say you saw him in McKeesport. Well, what was the occasion of your seeing him? Where did you see him?

A. Well, I see him sometimes on the street, and meet him in the street, and in restaurants.

Q. In the restaurant?

A. Yes.

Q. Where else?

A. That is all.

Q. Well, did you ever talk to him?

A. Oh, yes.

Q. And what language did you use in conversing with him, in talking with him?

A. Greek.

Q. Did you ever hear him talking to other people in English?

A. Yes.

Q. What kind of English did Andy use?

A. Well, broken English.

Q. Did he talk as well as you do, or better, or worse?

A. Well, no better.

Q. Could he understand what other people were saying to him in English?

A. Yes, but not much.

Q. Could he understand any better than you can?

A. Yes.

Q. Could he understand any better than you can?

A. No.

Q. You know what "sugar" is, don't you?

A. Yes.

Q. Do you know what "albumin" is?

A. I don't think so.

Q. Do you know what "urine" is?

A. (Witness does not answer.)

Q. Do you know what "blood" is?—Do you know what "blood" is?

A. Yes.

Q. Well, do you know what "high blood pressure" is? Do you know what "high blood pressure" is?

A. Yes.

Q. What is it?

A. I don't know what it is.

Q. Then why did you say "Yes"?

A. Well, I can't say, but I know "high blood pressure."

Q. You know a person is sick when he has high blood pressure, do you?

A. I can't talk that way; I know what is the nam of that.

Q. Did Andy Adamos know what "high blood pressure" meant?

A. No.

Q. Do you know what the stomach is?

A. Yes, sir.

Q. Did Andy Adamos know what his stomach was?

A. Oh, yes, I think so.

Q. Do you know what the prostate gland is?

A. No.

Q. Did Andy Adamos know what the prostate gland is?

A. No.

Q. Do you know what the word "rheumatism" means?

A. Yes.

Q. That word is the same in Greek as it is in English?

A. Yes.

Q. Do you know what the word "gout" means?

A. No.

Q. Do you know what the word "syphilis" means?

A. Yes.

Q. Now, did Andy Adamos know what the words "syphilis" and "rheumatism" mean?

A. Yes.

Q. Did Andy Adamos know what the word "gout" means?

A. No.

Q. Do you know what the word "physician" means?

A. "Physician"?

Q. "Physician," yes.

A. No.

Q. Do you know what the word "doctor" means? You know what a doctor is?

A. Oh, yes.

Q. Well, do you know that the words "physician" and "doctor" mean the same thing?

A. No.

Q. You don't know that. Did Andy Adamos know what the word "physician" means?

A. No.

Mr. Eckert:

I move that answer be striken out, as not being within the scope of this man's knowledge.

The Court:

That applies equally to all the questions that he asks of this witness with reference to what Andy Adamos knew. I don't know how this man can tell what he knew and what he understood. We sustain the objection.

Q. How many times did you hear Andy Adamos talking in English?

A. (Witness does not answer.)

Q. How many times did you hear Andy Adamos talking to other people in English?

A. I don't remember, but many times I see him in the restaurant. He has got a restaurant in McKeesport, and sometimes I hear him talking there.

Q. And did you hear him talking to other people in English often enough for you to know the knowledge of English which Andy Adamos had?

Mr. Eckert:

If the Court please, it seems to me that is calling for a conclusion.

Mr. Meyer:

I could ask it very easily if I would dare use the larger words, but I don't with this witness. That is the trouble.

The Court:

I don't see how any man can testify to the state of knowledge of another man. He might testify to things that he has told another man, and assume he had knowledge of those things, but to bring out by this witness the knowledge that another man had of the English language, I think, is going pretty far, and what he understood. The best, I think, that you could get from him you have already gotten, and that is that he talked broken English. We will sustain the objection.

Q. Could Andy Adamos talk English as well as you, or better than you, or not so well as you?

Mr. Eckert:

You have asked that question.

Mr. Meyer:

Of this witness?

Mr. Eckert:

Surely.

(No Cross Examination.)

Testimony of Rudolph I. Gellison.

Rudolph I. Gellison, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Your name is Rudolph I. Gellison?

A. Yes, sir.

Q. Where do you live, Mr. Gellison?

A. I live in Coraopolis.

Q. And how old are you?

A. I am fifty years old.

Q. What is your present business or occupation?

A. I am the general foreman of painters for Jones & Laughlin Steel Corporation at Aliquippa.

Q. How long have you been in that position?

A. Well, as the general foreman of painters, I have been there since '21. Previously to that I was foreman with wood painters only, since 1912, and in '21 they gave me the structural painters along with the wood painters. And Andrew Adams, as I call him, came to me with the structural painters in '21.

Q. So you knew Andy Adams, or Adamos, from 1920 up until he died?

A. Yes, sir.

Q. How long did he work under you?

A. He worked under me from '21, some time in April or March of '21, until the spring of '26.

Q. And that was the time he was injured?

A. Yes.

Q. He was working for you at the time he was injured, was he?

A. Yes, sir.

Q. Did you ever converse with him?

A. No. I often tried to, but he couldn't understand English well enough to carry on a conversation in English; and he couldn't take instructions in English.

Q. He couldn't?

A. No.

Q. How did you arrange that he receive his instructions?

A. Well, we had other men there of the Greek nationality, that could speak English and speak Greek also, and through them I would talk to him.

Q. Then during the whole time he worked for you, you had to give him his instructions through an interpreter?

A. Well, not necessarily, because we had a great many gang bosses, and some of the gang bosses were Greek, and he didn't work directly under me— He worked under me, but not just directly under me in the working capacity.

Q. He was under what you call a gang boss?

A. Yes. When he came to work for me he was a good rigger, and a good man to work with, and a very hard worker, and I thought that he would understand English better than he did, and I gave him a gang boss job too, but I couldn't use him as a gang boss, because I couldn't myself tell him to go out on different jobs.

Q. Did you see him at any time after his accident?

A. Well, I had met him on the street.

Q. And when was the last time you remember seeing him before he died?

A. Well, I really couldn't say that, I don't know just how long it was; but it was very infrequently, because I don't live in Aliquippa, and I am only there from the time I work until I finish, and I get a train and go up home, and I didn't see him very often. I don't know just when I saw him, but he would get a train and go upstreet. Several times I met him over at the safety office over at J. & L. But I never could talk to him; I could say "Good morning," and "How are you today?" and he could answer that "All right," but as far as carrying on a conversation with him, I don't believe I could carry on a conversation with him.

Q. What was his general physical appearance? Was he a large man or a small man? Can you describe his height and his weight, and so on?

A. Well, I would say that he was a man about five foot seven or eight in height, weighing probably 150 to 160 pounds. He was always since I knew him, even when he worked under Mr. Morgan in the rigger

department as a structural painter—I always furnished an inspector for that job, and I knew before he came to work for me—I have always known him as an exceptionally hard worker, an exceptionally good man on the gang.

Q. And what about his being off on account of ill health?

A. Well, previous to the accident, I don't believe he ever lost much time on account of ill health—not to my recollection, I can't think of him being off, because he was always on the job.

Q. Was his general appearance that of a weakling or healthy, strong man?

A. No, he was a strong man—previous to the accident; of course then he started to go downhill pretty fast.

(No Cross Examination.)

Testimony of Nick Girdis.

Nick Girdis, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Where do you live, Mr. Girdis?

A. McKeesport.

Q. And what is your age?

A. Thirty-five.

Q. What is your present business?

A. Painter.

Q. Where were you born?

A. In Greece.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. How long have you been living in America?

A. Twenty years—nineteen years.

Q. Did you know Andy Adamos in his lifetime?

A. Yes, sir.

Q. How long had you known him?

A. Oh, I know him about eight or nine years.

Q. Did you ever talk to him?

A. Yes, sir.

Q. What was the occasion of your talking to him?

A. You mean—

Q. Well, when did you talk to him?

A. Any time I saw him, any time I met him.

Q. And where would you meet him?

A. I met him a lot of different places.

Q. What?

A. I met him at different places.

Q. Did you ever see him at his place of business in McKeesport?

A. Yes, sir.

Q. Did you ever see him working down at Aliquippa before he was hurt?

A. Yes, but I never saw him working; I saw him outside.

Q. When you talked to Andy Adamos, what language did you use?

A. Well, we generally would use in our speaking—of course, he wasn't talking very good English, and I had to use the Greek language.

Q. You had to use the Greek language, to make him understand?

A. Yes.

Q. Did you hear him talking to other people in English?

A. Yes, sir.

Q. And did he have any difficulty in understanding other people?

A. Well, when he went to talk to American people he have to use it as long as he can. He can't talk very much, but he has to use it. He can't understand very much, but he had to use that anyway.

Q. Did he talk as good English as you are talking now?

A. Oh, no, no, sir.

Q. Not near as good?

A. No, sir.

Q. Did he understand English as well as you understand it?

A. No, sir.

Q. Do you yourself know what the word "physician" means?

A. That is pretty tough; I don't know.

Q. Do you know what the word "doctor" means?

A. "Doctor," sure.

Q. Do you know what the word "rheumatism" means?

A. Yes, sir. That is all in the Greek language; we use that ordinarily in schools in Greece.

Q. Do you know what the word "gout" means?

A. No, sir.

Q. Do you know what the word "syphilis" means?

A. Yes, sir; that is one in our language.

Q. That is another Greek word. That is all.

(No Cross Examination.)

Testimony of George Bergeres.

George Bergeres, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Your name is George Bergeres?

A. Yes, sir.

Q. Where do you live?

A. McKeesport.

Q. How old are you, Mr. Bergeres?

A. I am forty-six.

Q. And what is your present occupation? What do you work at?

A. Oh, what I work at?— Business.

Q. What kind of business?

A. Now I ain't doing nothing.

Q. You did have a business?

A. Yes, sir.

Q. What kind of business?

A. Restaurant.

Q. And did you know Andy Adamos in his lifetime?

A. Yes, sir; he was my partner.

Q. He was your partner in this restaurant business. For how long?

A. For five months—five and a half months.

Q. And when was that, Mr. Bergeres?

A. What is it?

Q. When was it he was your partner?

A. Well, he come—

Q. No; when was it, what year was it?

A. Oh, when? 1931.

Q. What part of 1931?

A. December.

Q. It started in December, 1931?

A. Yes, sir.

Q. And kept on until when?

A. Until May.

Q. Until May of 1932?

A. May 26 or 27, I don't remember which.

Q. How often did you see him during the time of this partnership?

A. When we were together, you mean?

Q. Yes, during the time you were together.

A. Oh, he was there.

Q. You saw him every day?

A. To the time he is going down to Aliquippa to his daughter.

Q. You say until the time he went down to Aliquippa and died?

A. Yes.

Q. Now, during the time he was in the partnership, did he seem like a sick man or well man?

A. I didn't think he was sick.

Q. Well, did he have any sickness during the time?

A. He didn't have any sickness at all.

Q. Well, did he complain of having any pain, or anything of that sort?

A. Well, he complained at one time. In somebody's house he eat something, and when he come down he says, "I have got a little pain in the stomach." And he says, "I think I am going to go to a doctor, a colored doctor."

Q. He said he went to a colored doctor?

A. That he eat something that upset his stomach.

Q. Did you know about the time he went to the St. Francis Hospital?

A. Yes, he told me one time he was in the hospital.

Q. What did he tell you the doctors told him?

A. Oh, I don't know; he don't say anything about that.

Q. Well, did he tell you why he went to the hospital?

A. He don't say.

Q. Did you know about the time he went to the West Penn Hospital, to see Dr. Schildecker and some other doctors?

A. I don't know.

Q. You didn't know about that?

A. No.

Q. Now, in April, in the month of April, 1932, what was Mr. Adamos's appearance? Did he look like a well man or a sick man?

A. Well, he was all right, yes, he wasn't sick.

Q. Did he work in the restaurant during this time?

A. Yes.

Q. He did work in the restaurant?

A. He work in the restaurant.

Q. Did you notice any difference in his appearance?— Maybe you don't understand this. Did he look any different at the end of May from what he did in April?

A. I don't see any difference on him.

Q. How big a man was Andy?

A. As big as I am, but he was skinny.

Q. Was he as heavy as you?

A. I don't think he was; I think he weigh about 150 pounds, something like that.

Q. And how much do you weigh?

A. About 150-155, something like that.

Q. Now, when he went to Aliquippa—you said something about his going to Aliquippa in June. Was he sick when he went to Aliquippa?

A. Well, I didn't see him in Aliquippa.

The Court:

He didn't say he went in June, he said he went the last of May.

Q. When was it Andy went to Aliquippa?

A. After he quit the business.

Q. And that was about the end of May, 26th or 27th of May; and then he went to Aliquippa?

A. Then he went to Aliquippa.

Q. Was he sick then when he quit the business?

A. Oh, I seen him after two weeks again, he was in McKeesport.

Q. You saw him two weeks after that—where?

A. In McKeesport.

Q. And two weeks after that you saw him in McKeesport, and how did he look then?

A. He looked all right.

Q. You saw him about the time he applied for a passport?

Mr. Eckert:

There is no evidence he applied for a passport.

Mr. Meyer:

Yes, I think there is.

The Court:

There is evidence that he talked about it, but there is no evidence he applied for one.

Mr. Meyer:

I thought George Adamos said he did.

The Court:

No; he said he talked about it.

(No Cross Examination.)

George A. Adamos—Recalled.

George A. Adamos, recalled for further cross examination, testified as follows:

Cross Examination (Continued):

Mr. Eckert:

Q. Was your father naturalized?

A. Yes, sir.

Q. Do you remember what year?

A. 1902.

Testimony of Gertrude H. Berger.

Gertrude H. Berger, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

Mr. Meyer:

Q. Mrs. Berger, you are chief deputy clerk of the District Court of the United States for the Western District of Pennsylvania?

A. Yes, sir.

Q. And as such, are you custodian of the records of that office?

A. I am.

Q. Did you have supervision of the keeping of the record which is now before you, a book known as a Blotter of the United States District Court, showing the receipts of money on the various days appearing in that blotter?

A. Yes, sir.

Q. Will you turn to a page in this blotter for the 20th day of June, 1932, and state to the Court whether or not one Andreas Adams applied for a passport and paid the sum of $1.00 on that date?

A. Yes, he did.

Q. Under the name of Andreas Adams?

A. Yes, sir.

Mr. Eckert:

Q. How do you spell that?

A. A-n-d-r-e-a-s A-d-a-m-s.

(Paper marked Plaintiff's Exhibit No. 1.)

Q. Mrs. Berger, in an application for a passport by a citizen of the United States who has previously been naturalized, what is the practice of your office with respect to the name that is used in the application?

A. Well, very often we take it from their citizen papers, or we try to get the correct spelling. Sometimes they write it out for us, and we try to arrive at what we think, and what they say is the correct spelling of their name.

Q. For the purpose of identification?

A. Yes.

Q. I call your attention now to Plaintiff's Exhibit No. 1, in form a certified copy of a naturalization certificate for one Antreas—A-n-t-r-e-a-s Adams.

A. Well, this is not a certificate of our Court, but that might possibly have been a misspelling.

Q. That is the "t" for the "d"?

A. The "t," yes.

Cross Examination:

Mr. Eckert:

Q. Do you know, Mrs. Berger, whether the man who applied for the passport was the Andy Adamos, or Andrew Adams, who is involved in this case?

A. No, sir.

George A. Adamos—Recalled.

George A. Adamos, recalled, testified as follows:

Direct Examination:

Mr. Meyer:

Q. I call your attention, Mr. Adamos, to a paper marked Plaintiff's Exhibit No. 1, and ask you what that paper is?

A. This is a naturalization certificate.

Q. For whom?

A. For my father.

Q. And where did you get that paper? Where has that paper been?

A. My father had it.

Q. Your father had it?

A. Yes.

Q. Now, on that paper the name appears as "A-n-t-r-e-a-s Adams."

A. That is wrong, that "t"; it is supposed to be a "d'.'

Q. And what does the word "Andreas"—

A. "Andreas," yes, that is "Andrew."

Q. Is that the same as the American "Andrew" —or English "Andrew"?

A. Of course, when my father was here, see, it was hard, you know—the place where he used to work, instead of calling him "Andreas," they call him "Andrew"—that is the English—and they call him "Andy"—"Andy" and "Andrew". Of course, you know, in Greek it is "Andreas"; but this is wrong here (indicating on Plaintiff's Exhibit No. 1); instead of "d" they put a "t" in there.

Q. You referred yesterday in your testimony to your understanding or belief that your father had applied for a passport.

Q. Did you apply for a passport in the month of June, 1932?

A. Yes, sir.

Q. On what date?

A. I don't remember the date. It was the same day, or the second day, I don't remember.

Q. In the blotter that has been produced here by Mrs. Berger appears the name "George A. Adams" as having paid a fee on the 22nd day of June, 1932. Was or was not that you?

A. That was me, all right.

Q. And this was a passport to travel where?

A. To travel to Greece.

Mr. Meyer:

I offer in evidence Plaintiff's Exhibit No. 1.

(No Cross Examination.)

PLAINTIFF RESTS.

REBUTTAL.

Simon Kalkstone—Recalled.

Simon Kalkstone, recalled on behalf of defendant, in rebuttal, testified as follows:

Direct Examination:

Mr. Eckert:

Q. Mr. Kalkstone, did you hear Ignatius Alexandritis—that was the elderly gentleman who testified

for the plaintiff in this case—testifying on the stand?

A. Yes, sir.

Q. Could Andy Adamos speak better or worse English than that gentleman?

A. Much better.

Q. Could he understand English as well as, or better, or worse than that old gentleman?

A. Much better.

Q. Could Andy Adamos speak English about as well as the other gentlemen of Greek extraction who testified for the plaintiff in this case?

A. About as well.

Q. And could he understand about as well as they?

A. Yes, sir.

(No Cross Examination.)

DEFENDANT RESTS IN REBUTTAL.

TESTIMONY CLOSED.

Certificates.

I HEREBY CERTIFY that the foregoing pages contain a correct transcript of all the evidence taken upon the hearing pursuant to order of Court granting hearing on equitable issue of fraud, in the case of GEORGE A. ADAMOS VS. NEW YORK LIFE INSURANCE COMPANY, at No. 7424 Law; together with the offers of counsel, objections thereto, rulings of the Court thereon, and the exceptions thereto.

Pittsburgh, Pennsylvania, February 24, 1934.

HARRIET COLE THOMAS,
Official Reporter.

I, F. P. SCHOONMAKER, Judge of the District Court of the United States for the Western District of Pennsylvania, hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings thereon and exceptions thereto, taken upon the hearing on equitable issue of fraud in the case of GEORGE A. ADAMOS vs. NEW YORK LIFE INSURANCE COMPANY, at No. 7424 Law; all of which, so certified, is ordered to be filed, and to become a part of the record, this 26th day of February, 1934.

F. P. SCHOONMAKER,
Trial Judge.

Defendant's Exhibit "E."

11-773-180
11-773-181
11-780-717
11-780-718

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY—PART II

ANSWERS TO THE MEDICAL EXAMINER

This examination must be made in private; no agent or third person being present.

Notice to Medical Examiner: Use only black ink. This examination is to be photographed.

Do Not Use Dashes or Ditto Marks in Answering Questions

1. A. What is your occupation? (Full details.) A. Restaurant Proprietor

B. How long have you been engaged in your present occupation? B. 10 yrs

C. What was your previous occupation? C. Grocery Business

D. Have you ever changed your occupation or place of residence on account of your health? (If so, give full details.) D. No

2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details.) No

3. A. How many aerial flights have you taken and when last? A. None

B. State whether as passenger or pilot and whether you are a Reservist. B. No

C. Do you contemplate participation in aeronautics? (If so, state in what capacity and to what extent.) C. No.

4. In what States have you lived the last ten years, and which years in each? (If outside the U. S., in what countries, and which years in each.) Pennsylvania

5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants? A. None

B. How frequently, if at all, and in what quantity have you drunk any of them in the past? B. None

C. Have you within the last five years drunk any of them to excess? C. None

D. Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs D. None

6. A. Have you now pending any other application for insurance on your life or for the reinstate-

ment of insurance? "Yes" or "No" No
Name of each Company or Insurer.....

B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance? "Yes" or "No" No
Name of each Company or Insurer.....

C. Have you ever been declined for life insurance or for the reinstatement of life insurance? "Yes" or "No" No
Name of each Company or Insurer.....

D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for? "Yes" or "No" No
Name of each Company or Insurer.....

7. A. Have you ever had any accident or injury or undergone any surgical operation? "Yes" or "No" No

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? "Yes" or "No" No

C. Has albumin or sugar ever been found in your urine? "Yes" or "No" No

D. Have you ever been found to have a high blood pressure? "Yes" or "No" No

E. Have you ever raised or spat blood? "Yes" or "No" No

F. Have you gained or lost in weight in the last year? "Yes" or "No" No
Gain? No Loss? No Cause? No
If the answer to any query is "Yes" give Date, Details and Results, and, if within five years, name and address of every Physician consulted.

.....

	"Yes" or "No"	Name of Ailment, or Disease	N... A...
8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of			
A. The Brain or Nervous System?	No	.....	...
B. The Heart, Blood Vessels or Lungs	No	.....	...
C. The Stomach or Intestines, Liver, Kidneys or Bladder?	No	.....	...
D. The Skin, Middle Ear or Eyes?	No	.....	...
9. Have you ever had Rheumatism, Gout or Syphilis?	No	.....	...
10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?	No	.....	...

	Name and Address	Date
11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?	None (If none, say none)	.....

12. Family Record	Age if Living	Condition of Health, if not good, give full details	A... D...
Father	.....	.....	
Mother	.....	.....	
Brothers (.....	.....	.....	
(.....	.....	.....	
Sisters (.....	.....	.....	
(.....	.....	.....	

	"Yes" or "No"	Nam o
8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of		
A. The Brain or Nervous System?	No	...
B. The Heart, Blood Vessels or Lungs	No	...
C. The Stomach or Intestines, Liver, Kidneys or Bladder?	No	...
D. The Skin, Middle Ear or Eyes?	No	...
9. Have you ever had Rheumatism, Gout or Syphilis?	No	...
10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?	No	...

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?	Name and A None (If n

12. Family Record	Age if Living	Condition of Health, i give full det
Father	.....	.....
Mother	.....	.....
Brothers (.....	.....	.....
(.....	.....	.....
Sisters (.....	.....	.....
(.....	.....	.....

of Ailment, Disease	No. of Attacks	Date	Duration	Severity	Results and, if within five years, name and address of every physician or practitioner consulted
.....	.....	...	.....	.....	.....
.....	.....	...	.....	.....	.....
.....	.....	...	.....	.....	.....
.....	.....	...	.....	.....	.....
.....	.....	...	.....	.....	.....
.....	.....	...	.....	.....	.....

dress	Date	Reason for Consultation, Examination or Treatment and Results
	.....	.....

ne, say none)

not good, ls	Age at Death	Cause of Death	How Long Ill
.....	86	Pneumonia	2 days
.....	71	No Record	.....
.....	..	.....	.....
.....	58	Accident	Sudden
.....	..	.....	.....
.....	..	.....	.....

13. A. Is any person in your immediate household now ill with consumption? (If so, state who and what precautions are being taken.) No

B. Has any person in your immediate household suffered from or died of that disease within the past year? No

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 6th day of April, 1932.

Signature of the person
applying for insurance

ANDY ADAMOS

Witnessed by
J C WILEY, M. D.,
Medical Examiner.

MEDICAL EXAMINER'S REPORT

(To be filled out by the Medical Examiner only)

14. How well do you know applicant? New
15. Complexion? Brownish
    Color of hair? Black-Gray
    Color of eyes? Gray
16. Scars or marks of identification? None
17. Is applicant's general appearance healthy? (If not, give your opinion below as to cause and significance.) Yes
18. Is applicant deformed, lame, maimed or ruptured? (If so, state which and give history below.) No
19. Is applicant a Caucasian? (If not, what is applicant's race?) Yes
20. Pulse—
    A. Its rate, seated? 78
    B. Is it normal in character? Yes
    C. If irregular or intermittent, which and how often per minute? No
21. Blood Pressure? (To be taken in all cases and if in doubt about the heart it should be taken immediately after vigorous exercise and again five minutes later and both findings given.)
    Sys. 134
    Dias. 88
22. Age? 54 years.
    Does age given seem correct? Yes.
23. Height, exact? 5 feet 5 in.
    Weight, Exact? 152 lbs.
    without coat or
    and vest, Estimated? .....lbs.

Girth of chest, at fourth rib, 36 in.
Girth of abdomen at umbilicus, 34 in.

24. Do you find any evidence of past or present disease:—

A. Of Brain or Nervous System? A. No
(It is desirable in a doubtful case to test for station (Romberg) general, co-ordination and Argyl-Robertson pupil.)

B. Of the Heart? B. No
(By having the applicant bend over rapidly a few times, touching his hands to the floor, a heart murmur not otherwise brought out may be detected. If murmur or hypertrophy present fill in heart chart.)

C. Of the Lungs? C. No
(Among slender persons with suspected tuberculosis tendency or suspicious signs, an observation of the afternoon temperature is desirable.)

D. Of the Stomach or any of the Abdominal Organs? D. No
(A history of Appendicitis, Hepatic Colic, Ulcer of Stomach, etc., should lead to careful palpation of the abdomen to determine the presence of tenderness or of adhesions.)

E. Rheumatism or Gout? (Exclude Muscular Rheumatism.) E. No
(If so, what joints are affected?)

F. Of the Ear? Eyes? Skin? F. No
or any other part of the body? No

25. A. Does chemical examination of the applicant's urine show albumin? No Sugar? No If either, state amount No

B. State specific gravity. (If abnormal, give your opinion below as to the cause.) B. 1018

C. Has applicant had any genito-urinary ailment? (Syphilis, Stricture, etc.) C. No

26. If a Woman

A. Has she ever had any disease peculiar to her sex? A.

B. Is she now pregnant? B.

C. Have her pregnancies and labors been normal? C.

D. Has she passed the climacteric? D.

27. A. Have you ever seen the applicant under the influence of intoxicants or drugs? A. No

B. Do you know or suspect, that the applicant is now, or ever has been, intemperate? B. No (In case of suspected abuse of alcohol examine for tremor of fingers and of tongue.)

28. Do you know anything about the applicant's character or mode of life which unfavorably affects his insurability? No

29. Are you related by blood or marriage either to the applicant or to the agent in the case? No If so, how?

30. A. What is the name of the agent as given by the applicant? A. Simon Kalkstone

B. If known, state Branch Office agent is connected with. B. Pittsburgh

I CERTIFY that I have carefully examined (Print name in full) Andy Adamos of McKeesport, Pa., in private, and in the presence of any third person at (Give actual place of examination) My office Masonic Temple McKeesport Pa this 6th day of April 19....at 2.30

o'clock ~~A.M.~~ P.M. for an insurance of $5,000 on the applicant's life; that I have asked each question exactly as set forth on the other side of this sheet and that the applicant's answers thereto are in my handwriting, and are exactly as made by the applicant to me, and that the applicant signed them in my presence. I have also reviewed all answers on this and on the reverse side, and believe them to be full, complete and true.

J C WILEY, M. D.
McKeesport, Pa.
P. O. Address

To the Medical Examiner: Any erasures or alterations in your report should be initialed by you. Your report should give the Company a pen picture of the applicant. Any information which for any reason you prefer not to embody in your report should be sent direct to the Company in New York City without delay. If you prefer to do so you may send this report direct to the Company.

ADDITIONAL REMARKS

Defendant's Exhibit "F."

DR. B. T. OWENS
244 Franklin Avenue
Aliquippa, Pa.

Date 12/11/31

R Patient's Name Andrew Adams
Address 119 Oakwood
Strontium Bromide Dram III

Tr Belladonnae Ounces III
F. E. Cascera—Sag. Arom Dram I
Carapeptic Liquid Qsad Ounces IV
Misce
Sig. 3T c aqua T.I.D. P.C.

B. T. Owens M. D.

Refill subject to my order
47244

Defendant's Exhibit "G."

Tel. Office: Atlantic 7856
Residence: Mayflower 2887

Dr. Zacharias Spanos
811 Wylie Avenue

Pittsburgh, Pa. February 14th 1933.

Mr. C. C. Browning
1114 Clark Bldg.
Pittsburgh, Pa.

Dear Sir:

Referring to our recent conversation concerning the late Andy Adamos of Aliquippa, Pa., I can say that he was known by me for the past 10 years. I have treated him on different occasions for slight colds and several times during the year 1931 I treated him for hypertrophy of the prostate. Then in the fore part of February 1932 He called at my office complaining of slight pains in the abdomen, particularly of the hypogastric region. Unable to diagnose his case I advised

hospitalization. I referred him to the St. Francis Hospital under the care of Dr. A. D'Zmura. About a week later this doctor informed me that the diagnosis of carcinoma was made. Since that time, sometime in February 1932, I did not see Mr. Adamos, but heard that he died last summer.

Signed. ZACHARIAS SPANOS

Defendant's Exhibit "H."

DR. ANDREW P. D'ZMURA
Physicians Bldg., 121 University Place
Pittsburgh, Pa.

R For Andrew Adams (Inoperable carcinoma)
Address 328 Franklin Ave.,
Aliquippa, Pa.

Date Feb. 12, 1932.

Codeinae Sulphatis gr. I
Tabellae Tales XX
Sig: one tablet when necessary for relief of pain

47785

A. P. D'ZMURA M. D.

Defendant's Exhibit "O."

11-773-180
11-773-181
11-780-717
11-780-718

APPLICATION
TO THE
NEW YORK LIFE
INSURANCE COMPANY

PART I.

I, Andy Adamos
(Print name in full)

1.

	Residence	*Place of Business*
State	Penn	Same
County	Allegh.	Same
City or Town	McKeesport	Same
Street	Huey	919 Walnut
No.	817 R. F. D.....	

Name of firm or employer

.....

Present Occupation Prop. Restaurant
State exact duties in full.....
Other Occupations (if any).....
Born at Greece
on 3 day of Aug. 1878
Married
~~Not married~~
(Strike out one)
Race or Nationality Greek

Send all communications to
~~Residence~~
Place of business (Strike out one)
Former Residence* .....
Former place of business* .....
Former firm or employer* .....
* No answer required unless change has taken place within past two years.

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

2. Sum to be insured, $5000
Premiums how payable, Annuel
Age nearest birthday ~~54~~
3. Plan of Insurance Ordinary
~~With Waiver of Premium~~
~~With Double Indemnity~~
(Strike out benefits not desired)
Date Policy as of ~~date of this application~~ date policy is written
(Strike out one)
4. Dividend to be
a. ~~Paid in cash;~~
b. Applied toward payment of premiums;
c. ~~Applied to purchase additional paid-up insurance;~~
d. ~~Left to accumulate at interest, subject to my order.~~
(Strike out three)
5. Beneficiary to receive the proceeds of policy in event of death, with reservation of right to change the Beneficiary,
Beneficiary (Print name in full) Estate

Relationship .....
Residence .....

6. a. The following is all the insurance now in force on my life:
   State name of Company and Amount (If none, say none) None
   b. The insurance for which I am now applying is not intended to take the place of insurance carried with this or any other Company. If it is, give particulars:
7. Of the insurance on my life the amount which includes benefits in event of total disability is $ None (If none, say none)
8. No Company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing from the insurance applied for, except as follows: (If none, say none) No
9. I {~~have~~ } have not {participated as a passenger or otherwise in aviation or aeronautics. No
10. ADDITIONS OR AMENDMENTS
    (For Home Office use only)
    (2) Additional policy $5000 written on the Ordinary Life Plan

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however,

that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and so declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That a receipt on the form attached as a coupon to this application form is the only receipt the agent is authorized to give for any payment made before the delivery of the policy. 3. That only the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability. 4. That by receiving and accepting said policy, any additions or amendments hereto which the Company may make and refer to in Question 10 above

entitled "Additions or Amendments" are hereby ratified.

Dated at McKeesport this 6 day of April 1932.

Signature of the person
applying for insurance ANDY ADAMOS.
(Write the name in full)

Witnessed by S. Kalkstone
Agent.

Other Agents none

Names and Residences of three intimate friends

....
....
....

○ 932-40. U. S.—1. Printed by New York Life Ins. Co., New York City

---

DECLARATION TO BE SIGNED BY APPLICANT UPON MAKING ANY PAYMENT WITH THIS APPLICATION

4B 56841

Dated at.....193..

I HEREBY DECLARE that I have paid to.....
.....Dollars ($.....) in cash, and that I hold his receipt for the same, made up, without alteration, on the receipt form detached from and corresponding in date and number with this application. I assent to the terms of said receipt.

(Signature of Applicant).....

"The receipt form corresponding in number with this application was not used. Therefore, it was detached and destroyed at Pittsburgh Branch Office."

TEAR OFF HERE

Defendant's Exhibit "P."

NOTE { This form must not be changed or modified in any way, but remain as made out by the Home Office

NEW YORK LIFE INSURANCE COMPANY

Name ADAMOS

No. 11 780 717
File No. 11 773 180/1

SUPPLEMENTAL APPLICATION FOR INSURANCE

To the New York Life Insurance Company:

Supplemental to my application for insurance dated the 6th day of April 1932, I hereby apply for $5000 additional insurance on the Ordinary Life plan, to take effect April 8th 1932 and I reiterate and confirm all the agreements, statements, representations and answers contained in my said original application and agree that said original application shall form a part of said additional insurance contract. I further warrant and declare that no change has occurred in my health or insurability since the date of my said original application.

Dated, April 19th 1932

ANDY ADAMOS
Applicant

Witness, Simon Kalkstone

Forwarded from Pittsburgh Branch Office Jun 20 1932

○ 1794. May, 1925
Printed by New York Life Ins. Co., N. Y. City

TO THE COMPTROLLERS' DEPARTMENT

Defendant's Exhibit "Q."

NOTE { This form must not be changed or modified in any way, but remain as made out by the Home Office

NEW YORK LIFE INSURANCE COMPANY

Name ADAMOS

No. 11 780 718
File No. 11 773 180/1

SUPPLEMENTAL APPLICATION FOR INSURANCE

To the New York Life Insurance Company:

Supplemental to my application for insurance dated the 6th day of April 1932, I hereby apply for $5000 additional insurance on the Ordinary Life plan, to take effect April 8th 1932 and I reiterate and confirm all the agreements, statements, representations and answers contained in my said original application and agree that said original application shall form a part of said additional insurance contract. I further warrant and declare that no change has occurred in my health or insurability since the date of my said original application.

Dated, April 19th 1932

ANDY ADAMOS
Applicant

Witness, Simon Kalkstone

Forwarded from Pittsburgh Branch Office Jun 20 1932

○ 1794. May, 1925
Printed by New York Life Ins. Co., N. Y. City

TO THE COMPTROLLERS' DEPARTMENT

Defendant's Exhibit "T."

20186 A

Write Plainly with unfading ink—This is a permanent Record.

N. B.—Every item of information should be carefully supplied. Age should be stated exactly. Physicians should state cause of death in plain terms, so that it may be properly classified. Exact Statement of Occupation is very important. See instructions on back of certificate.

This is to Certify that the following is a true and correct copy of a certificate of death filed in the Bureau of Vital Statistics, Pennsylvania Department of Health, as directed by Act of the General Assembly.

(Date) Aug. 1, 1932.

EVELYN JONES,

(SEAL) *Chief, Bureau of Vital Statistics.*

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH
BUREAU OF VITAL STATISTICS

File No. 68287
Registered No. 102

CERTIFICATE OF DEATH

1. Place of Death
County of Beaver
Township of .....
or
Borough of Aliquippa
or
City of .....

Registration District No. 04-01
Primary Registration District No. 04-01-01

2. Full Name Andrew Adams
   (a) Residence, (Usual Place of Abode.) No. 106 Edgewood St.,....Ward..... (If non-resident give city or town and State)
   [If death occurred in a Hospital or Institution—give its Name instead of street and number.]
   Length of residence in city or town where death occured yrs. mos. ds.
   How long in U. S., if of foreign birth? yrs. mos. ds.

Personal and Statistical Particulars

3. Sex M.
4. Color or Race White
5. Single, Married, Widowed or Divorced (write the word) Widowed
5a. If married, widowed, or divorced
   Husband of
   (or) Wife of Mary
6. Date of Birth (month, day and year) Unknown
7. Age Approx. 54 Years Months — Days — If Less than 1 day
   ..... hrs.
   or ..... min.
8. Occupation of Deceased
   (a) Trade, profession or particular kind of work Painter
   (b) General nature of industry, business or establishment in which employed (or employer)
   .....

(c) Name of employer J. & L. Steel Co.

9. Birthplace (city or town).....
(State or Country) Greece

Parents

10. Name of Father George Adams
11. Birthplace of Father (city or town).....
(State or Country) Greece
12. Maiden Name of Mother Alathena Lefas
13. Birthplace of Mother (city or town).....
(State or Country) Greece
14. Informant A. Adams, (Address) Aliquippa, Pa.
15. Filed 7-8-1932

F. A. HORNSTEIN
Registrar

Medical Certificate of Death

16. Date of Death—(Month) 7 (Day) 6
(Year) 1932
17. I HEREBY CERTIFY, That I attended deceased from Mar. 15, 1932, to July 5, 1932, that I last saw him alive on July 5, 1932, and that death occurred, on the date stated above, at 7.30 A. M.
The Cause of Death* was as follows: Carcinoma of Sigmoid
.....(duration)..... yrs. 8 mos. .....days
Contributory (Secondary) .....
.....(duration).... yrs. .... mos. ....days
18. Where was disease contracted if not at place of death? .....
Did an operation precede death? No Date of....

Was there an autopsy? No
What test confirmed diagnosis? None

(Signed) B. T. OWENS, M. D.
D. O.

7-9-1932

(Address) Aliquippa, Pa.

*State the Disease Causing Death, or in deaths from Violent Causes, state (1) Means and Nature of Injury, and (2) whether Accidental, Suicidal, or Homicidal. (See reverse side for additional space.)

19. Place of Burial, Cremation or Removal Woodlawn Cem.
Date of Burial 7-8-1932
20. Undertaker Hornstein Inc.
Address Aliquippa, Pa.

Findings of Fact and Conclusions of Law.

(Filed Nov. 3, 1933.)

OPINION

On Equitable Issue Raised under Section 274 (b) of the Judicial Code

SCHOONMAKER, *J.*:

This is an action at law by George A. Adamos, beneficiary named in four policies of insurance issued by the New York Life Insurance Company, each in the sum of five thousand dollars upon the life of Andy Adamos, father of the beneficiary.

The defendant has set up an equitable defense under Section 274(b) of the Judicial Code (28 USCA Sec. 39(a)), contained in the "New Matter" set forth in the defendant's affidavit of defense. To this "New Matter," the plaintiff has replied, and the equitable issue was tried before the court on the new matter set out in the defendant's affidavit of defense, plaintiff's reply, and the proofs.

By the equitable defense, the defendant is seeking to have the four insurance policies declared null and void and cancelled, by reason of alleged false answers in the application for this insurance.

FINDINGS OF FACT.

From the pleadings and proofs upon the equitable issue, we find the facts to be as follows:

1. The defendant issued and delivered to Andy Adamos four insurance policies, each in the sum of five thousand dollars, two dated April 8, 1932, and delivered April 15, 1932, being Nos. 11,773,180 and 11,773,181. The other two, namely Nos. 11,780,717 and 11,780,718, were dated April 19, 1932, and were delivered during the latter part of May or the first part of June, 1932. Copies of these policies are attached to plaintiff's statement of claim.

2. The medical examination for all of these policies was made on April 6, 1932, by Dr. J. C. Wiley. The answers of Adamos to the medical questions are in writing and signed by him, four copies of which are attached to the four policies of insurance that were delivered to him. In Part II of the application for the

above insurance, immediately over Adamos's signature, there appears among other things, the following:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

3. In the said medical examination blank (copy of which is attached to the policies), Andy Adamos was asked and answered the following questions, to-wit:

"7. A. Have you ever had any accident or injury or undergone any surgical operation? No.

B. Have you ever been under the observation or treatment in any hospital, asylum, or sanitarium? No.

D. Have you ever been found to have a high blood pressure? No.

F. Have you gained or lost in weight in the last year? No.

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

C. The Stomach or Intestines, Liver, Kidneys or Bladder? No.

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

4. That each of the answers quoted above in Paragraph 3 hereof is false, the actual facts being that on March 14, 1926, he fell while working for the Jones & Laughlin Steel Corporation, fractured certain of his lumbar vertebrae, fractured both of his femurs and his left tibia. As a result of these injuries, he underwent a surgical operation by Dr. H. E. McGuire in South Side Hospital in Pittsburgh, where he was confined from March 14, 1926, to July 8, 1926. From the time of this accident until his death, Adamos collected workmen's compensation from the Jones & Laughlin Steel Corporation as for total disability.

5. In addition to this accident and hospital experience, and as the result of the accident noted in paragraph 4, said Andy Adamos repeatedly, prior to the delivery to him of the insurance policies in question, consulted physicians and was under observation or treatment in hospitals, particular incidents of which are as follows: In 1930, or 1931, Adamos was treated six or seven times by Dr. Spanos for hypertrophy of the prostate gland. In November, 1931, Dr. D. A. Belinky was called to Adamos' residence, examined him, and prescribed for him. At this time, Adamos was confined to bed and was complaining of pain in his back and abdomen. He diagnosed the case as sacroiliac arthritis and a badly constipated bowel. Again, in December, 1931, Dr. B. T. Owens was called to

Adamos' home to attend him, found him in bed, and complaining of pains throughout his abdomen. Dr. Owens diagnosed the case as chronic appendix. Dr. Owens attended Adamos the same month, found him still in bed with pain and much weaker than on the previous occasion. In February, 1932, Adamos again consulted Dr. Spanos, calling at the doctor's office, and complaining of pain in his abdomen, saying to Dr. Spanos that he had been visiting different doctors, that some of them told him he had a bad appendix, that others told him he had gallstones, or something of that kind. Dr. Spanos then sent him to St. Francis Hospital to Dr. Andrew D'Zmura. On February 9, 1932, Adamos entered St. Francis Hospital in Pittsburgh, left there February 12. He was examined there by Dr. D'Zmura, who diagnosed Adamos' case as inoperable carcinoma involving the prostate gland and surrounding structures. The only prescription that Dr. D'Zmura was able to give him was a narcotic for the relief of pain. At the time he was in St. Francis Hospital under observation of Dr. D'Zmura, he was very weak, was complaining of pain, and had lost weight. Sometime while Adamos was in St. Francis Hospital, he was examined by Dr. G. H. Davison, a specialist in genito-urinary diseases, who diagnosed his case as advanced carcinoma. On February 23, 1932, Dr. Owens was again called to Adamos' house to attend him, found his condition at that time to be weaker, that he seemed to have lost weight. Dr. Owens also felt a mass in the lower left abdomen, and suspected carcinoma of the rectum and lower bowel. On April 18, 1932, Dr. M. R. Hadley was called to attend Adamos.

At that time, Dr. Hadley found Adamos in marked pain, lying in bed and groaning. This doctor did not make a definite diagnosis, but had in his mind the opinion of cancer, and gave a narcotic to relieve the pain. Dr. Hadley referred the case to Dr. Langer in the West Penn Hospital. Adamos remained at the West Penn Hospital until April 29. While there, Dr. C. B. Schildecker, Dr. C. H. Ketterer, Dr. Heinz Langer, and others, examined him. These doctors all found Adamos to be suffering from carcinoma in a very advanced stage.

6. On July 6, 1932, Adamos died, and the official death certificate (Exhibit T offered in evidence) showed that death was caused by carcinoma of sigmoid of eight months' duration.

7. In each of the policies of insurance in Part I of the application, (copy of which is attached to the policy), it is provided:

> "It is mutually agreed as follows:
>
> 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination;"

As a matter of fact, before the last two policies dated April 19, 1932, were delivered to Adamos, he had consulted a doctor and had been in the hospital. Dr. Hadley was called to attend him on April 18, 1932; and he was in the West Penn Hospital from April 21 to April

29, 1932, inclusive, where he was examined by a number of doctors.

CONCLUSIONS OF LAW.

From these facts, we conclude, as a matter of law:

(1) That all the policies sued upon are voidable because of misrepresentation and fraud.

(2) That the two policies dated April 19, 1932, are vitiated by reason of Adamos not having disclosed, when they were delivered to him the latter part of May, or the first of June, 1932, his medical history since his examination on April 6, 1932.

(3) That the defendant is entitled to have the four policies sued upon delivered to it and cancelled.

(4) That this equitable relief bar the plaintiff from any recovery upon the policies sued upon.

DISCUSSION.

This is a very plain case of fraud upon the insurance company. The plaintiff in this case offered evidence to show that Adamos was a Greek, and that he did not understand well the English language. But we are of the opinion, from the evidence in the case, and have found, that Adamos falsely answered the questions as to his medical history. We are of the opinion, in addition to that, that he is bound by the answers appearing in his application; he had no business to sign his name to those answers in his application, unless he did understand what was being said to him, and what he was signing.

The courts generally hold that by signing an instrument such as an application for insurance policy, the signer binds himself and those claiming through him to the instrument as actually written: *Stanulevich vs. St. Lawrence Life Ass'n,* 228 N. Y. 586; *Kwiatkowski vs. Brotherhood of American Yeomen,* 243 N. Y. 394; *Erickson vs. Knights of the Maccabees,* 71 Colo. 9, 203 Pacific 674; *Lauze vs. New York Life Insurance Co.,* 74 N. H. 334, 68 Atl. 31; *Emanuele vs. Metropolitan Life Insurance Co.,* 242 N. Y. S. 715; *Goldberg vs. Knickerbocker Insurance Co.,* 82 Pa. Super. Ct. 302; *New York Life Insurance Co. vs. Fletcher,* 117 U. S. 519; *Aetna Life Insurance Co. vs. Moore,* 231 U. S. 543; *Raives vs. Raives,* 54 Fed. (2) 267.

The medical questions asked of Adamos in the medical examination application are all matters of fact within his knowledge, and required no technical training or education on his part to answer. We are of the opinion that he is clearly bound by them, and that these policies of insurance must be vacated and set aside.

The conclusion we have arrived at in this case, that the false answers of Adamos to the medical questions in his application for insurance, void these policies, is fully supported by the opinion of the Circuit Court of Appeals in the case of *New York Life Insurance Co. vs. Marotta,* 57 Fed. (2) 1038.

In addition to that, it may be noted that the Supreme Court of the United States has held that an applicant for insurance must inform the insurer when delivery of a policy is tendered to him of any pertinent facts bearing on his health which have occurred be-

tween the date of his medical examination and delivery of the policy: *Stipcich vs. Metropolitan Life Insurance Co.*, 277 U. S. 311.

A decree may be submitted in accordance with this opinion.

Decree.

(Filed Nov. 4, 1933.)

Now, to-wit, November 4, 1933, pursuant to the adjudication filed yesterday in the above entitled case, it is hereby ordered, adjudged and decreed that policies of insurance No. 11,773,180, No. 11,773,181, No. 11,780,717 and No. 11,780,718, each in the sum of $5,000 written by the defendant on the life of Andy Adamos, be and they are each and all hereby cancelled and rescinded; that the defendant, the New York Life Insurance Company, be and it hereby is discharged from any liability whatsoever on account of any or all of said policies; that the plaintiff, George A. Adamos, forthwith surrender and manually deliver each and all of said policies of insurance to the defendant, or its counsel of record, Messrs. Smith, Buchanan, Scott & Gordon; and that the sum of $1184.36 paid into Court by the defendant be paid by the Clerk of this Court, less his poundage, to the plaintiff, George A. Adamos.

PER CURIAM:

S.

Eo die, exception noted to plaintiff and bill sealed.

F. P. SCHOONMAKER, (SEAL)
Judge.

Petition of Plaintiff for Rehearing.

(Filed Jan. 30, 1934.)

To the Honorable, the Judges of said Court:

The petition of George Adamos, plaintiff in the above entitled case, shows:

(1) On the 22nd day of December, 1932, the plaintiff herein filed his Statement of Claim in the Court of Common Pleas of Allegheny County, against New York Life Insurance Company, a corporation, alleging that said corporation was indebted to him, the said plaintiff, in the sum of Twenty Thousand ($20,000.00) Dollars, basing his claim on four life insurance policies, each in the sum of Five Thousand ($5,000.00) Dollars, issued by the said corporation on the life of Andy Adamos, father of the plaintiff, in which the plaintiff was named beneficiary, and asking judgment for the full amount after furnishing proof of death of the insured and demanded payment which was refused by the defendant.

(2) On January 5th, 1933, the defendant corporation petitioned the Court of Common Pleas of Allegheny County for removal of the cause to the District Court of the United States for the Western District of Pennsylvania, which was granted, and the exemplification of the record from the Court of Common Pleas of Allegheny County was filed in the District Court of the United States on February 3rd, 1933.

(3) On February 15th, 1933, the defendant herein filed its answer, denying liability on the ground of misrepresentation and fraud, and alleging false answers by the insured in his application which induced

the defendant corporation, by fraud, to insure said Andy Adamos, the insured, and alleging certain new matter.

(4) On March 23rd, 1933, the plaintiff herein filed its answer to new matter, denying that the defendant corporation was induced, by fraud and misrepresentation, to issue insurance upon the life of Andy Adamos, the insured, and alleging that the insured, Andy Adamos, was illiterate and could read and understand very little of the English language, and relied upon the examiner and the agent for the defendant corporation to procure for the insured the insurance applied for in the applications, and alleging that said answers, if given, were not material to the risk.

(5) On September 8th, 1933, the defendant herein petitioned the Court for a hearing on the equitable issues involved in said matter, under Section 274 (b) of the Judicial Code, (28 U. S. C. A., Section 39-A), which petition was granted and hearing held on October 23rd, 1933.

(6) On the 3rd day of November, 1933, this Court rendered a decision in the above cause, and on the 4th day of November, 1933, a decree was entered in said Court in favor of the defendant, pursuant to said decision, directing that the four insurance policies in this case, in the sum of Five Thousand ($5,000.00) Dollars each, be cancelled and rescinded, and further that the defendant be discharged from any liability, and directing the plaintiff to surrender the policies to the defendant for cancellation.

(7) That the opinion and decree of the Court failed to pass upon and decide the issue in said cause as to the legibility of each copy of the application attached to the four policies of the insured, Andy Adamos, for the insurance, and the legibility of the examiner's report attached to each separate policy upon which the suit is based.

(8) That the opinion and decree of Court failed to pass upon and decide whether the application of the insured, Andy Adamos, a copy of which is attached to each policy sued upon, complied with the Statute of Pennsylvania, Act of May 17, 1921, P. L. 682, Section 410-d, formerly the Act of May 11, 1889, P. L. 20, requiring a copy of the application to be attached to the policy if it is to be considered a part of the contract.

(9) That the answers relied upon in said application to defeat the plaintiff's cause cannot be taken advantage of by the defendant corporation as a defense unless said applications meet the requirements of the law as being a copy of the application sufficiently large and legible enough to be read by persons of normal eyesight, under normal conditions, and with reasonable ease.

(10) That the recent case of *New York Life Insurance Company v. J. Halpern, et al.*, 61 Fed. (2) 1037, decided by the Circuit Court of Appeals for the Third Circuit, in which the same company was plaintiff as is defendant in this cause, and in which the application attached was identical with the applications in the present cause, presents a precedent that becomes a controlling decision in the within cause,

which the petitioner alleges was either overlooked by the Court, or to which attention was not drawn through neglect or inadvertence of counsel.

Wherefore, your petitioner prays that this Court will grant a rehearing of the said cause on such terms as to this Court shall seem just.

And your petitioner will ever pray, etc.

JOHN D. MEYER,
ALAN S. CHRISTNER,
Attorneys for Petitioner.

AFFIDAVIT.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.

Before me, the undersigned authority, personally appeared George A. Adamos, the within named petitioner, who, being duly sworn according to law, doth depose and say that the facts contained in the foregoing Petition are true and correct.

GEORGE A. ADAMOS.

Sworn to and subscribed before me this 30th day of January, A. D. 1934.

HYMEN SCHLESINGER,
(SEAL) *Notary Public.*
Commission expires June 27, 1936.

ORDER OF COURT.

And now, to-wit, January 30th, 1934, the foregoing Petition presented in open Court, and upon consideration thereof, and upon motion of John D. Meyer and Alan S. Christner, attorneys for the petitioner, it is ordered, adjudged and decreed that a rule is hereby entered upon the defendant to show cause, if any it has, why the prayer of the foregoing Petition should not be granted, and a rehearing ordered in the above entitled cause.

Returnable forthwith.

PER CURIAM:

S.

Opinion on Plaintiff's Request for Rehearing.

(Filed Feb. 2, 1934.)

SCHOONMAKER, *J.:*

An equitable issue was raised in this case as to whether the life-insurance policies sued upon were void for fraud on part of the insured. We heard this issue and found in favor of the defendant, by decree entered November 4, 1933. A new term has intervened since that decree.

The plaintiff, on January 30, 1934, asked a rehearing in this case, because the court failed to pass upon and decide whether the application of the insured attached to the policies sued upon became a part of the insurance contract, within the purview of the Pennsylvania Statute of May 17, 1921, P. L. 682, Section

410-d, formerly the Act of May 11, 1881, P. L. 20, by reason of the alleged illegibility of the copy of the application attached to the policies.

In the first place, a term has intervened since our decree of November 4, 1933, and we are of the opinion we have no power to modify or change that decree. Equity Rule 69 provides: "No rehearing shall be granted after the term at which the final decree of court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court." We regard our decree of November 4, 1933, as a final decree from which an appeal would lie. Therefore, a rehearing would be of no avail.

In the second place, we cannot find that the copy of the application is so illegible as to fail of compliance with the Pennsylvania statute. We have had no trouble in reading it, and do not think the applicant would. The application and the insurance policies, with the copy of the application, were offered in evidence on the trial of the equitable issue, without objection on the part of the plaintiff.

Counsel for plaintiff rely on the case of New York Life Insurance Co. vs. Halpern, 57 Fed. (2) 200, 203, (affirmed by *Per Curiam* Opinion of the C. C. A., 61 Fed. (2) 1037), as sustaining their position. We cannot so read that case. Judge Gibson, the trial judge, merely held that the insurance company could not urge that the insured was estopped from asserting any error in the answers recorded in the application, because the copy attached to the policy was in such small type as to be practically illegible.

No such presumption was asserted or relied on by the Insurance Company in the instant case. We based no finding on any such presumption. To our mind, the proofs in this case disclosed a deliberate concealment by plaintiff of his physical condition and medical history, in order to induce the issuance of the insurance policies.

The plaintiff's petition for rehearing will be denied.

ORDER OF COURT.

Now, February 2, 1934, this case came on to be heard on a rule to show cause why plaintiff's petition for a rehearing of this case should not be granted, and on due consideration thereof, it is hereby ordered that said rule be, and is, hereby discharged and that the plaintiff's petition for a rehearing be denied.

PER CURIAM:
SCHOONMAKER.

Same day, plaintiff excepts to this order, exception noted and bill sealed.

F. P. SCHOONMAKER, (SEAL)
Judge.

Petition for Appeal.

To the Honorable F. P. Schoonmaker, Judge of the said Court:

The petition of George A. Adamos respectfully represents:

(1) The above entitled suit is in law, brought by the petitioner to collect on four policies of life insur-

ance issued by the defendant corporation to the father of the said George A. Adamos, now deceased, naming George A. Adamos as beneficiary, and a hearing held on the equitable defenses raised in the above entitled case under equity procedure where equitable defenses are relied upon to defeat liability. The suit resulted in a decree being entered on November 4th, 1933, cancelling and rescinding the policies of insurance, and relieving the defendant corporation from liability.

(2) The petitioner feels himself aggrieved by said decree for the errors assigned in the accompanying assignment of errors, filed herewith.

Wherefore, your petitioner prays that an appeal be allowed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, and that for such purpose a citation issue, transcript of the record, proceedings, papers and evidence, and all else on which the said decree is based be made and duly authenticated and sent to said United States Circuit Court of Appeals for the Third Circuit, that the amount of the appeal bond be fixed to cover costs, and also to act as a supersedeas, that a supersedeas be allowed and the operation of the aforesaid decree be sustained pending the appeal here prayed for, and that such other orders and process be made and issue as may cause the said error to be corrected and the said judgment to be reversed by the United States Circuit Court of Appeals for the Third Circuit.

JOHN D. MEYER,
ALAN S. CHRISTNER,
Attorneys for the Petitioner.

ORDER OF COURT.

And now, to-wit, February 3rd, 1934, the foregoing Petition having been presented in open Court, upon consideration of the same, and it appearing to the Court that the petitioner has filed his assignment of errors, it is ordered, adjudged and decreed that an appeal be allowed in the above entitled case to the United States Circuit Court of Appeals for the Third Circuit from the decree entered on November 4th, 1932, that a citation issue, that a transcript of the records, proceedings, papers, evidence and all else upon which said decree is based, be made and duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit, that an appeal bond for costs and supersedeas be given in the sum of $200.00, and that a supersedeas issue, restraining and suspending all operation of or execution process upon said decree pending the said appeal.

PER CURIAM:

S.

Assignment of Errors.

(Filed Feb. 3, 1934.)

Comes now the said George A. Adamos, plaintiff in the above entitled case, and complains that in the record and proceedings in said case and in the final decree manifest error has occurred to the prejudice of the plaintiff, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from

the decree of this court, entered on the 4th day of November, 1932.

First: The District Court erred in making an order whereby a rule was granted to show cause why a hearing before a Chancellor should not be held according to equity procedure for the purpose of adjudicating equitable issues and was made absolute, the said order and exception thereto being as follows:

"ORDER

Now, to-wit, October 9, 1933, after argument by counsel for the parties to the above entitled case and due consideration, it is ordered that the rule granted September 8, 1933, to show cause why a hearing before a Chancellor of this court according to equity procedure should not be held for the purpose of adjudicating the equitable issues involved in the above entitled case, be and it hereby is made absolute.

PER CURIAM:

S.

Eo die, exception noted to plaintiff and bill sealed.

F. P. SCHOONMAKER, (SEAL)
Judge."

Second: The District Court erred in entering a decree cancelling and rescinding the policies of insurance sued upon in the above cause and discharging the defendant from any liability whatsoever on account of any of the policies, said decree and the exception thereto being as follows:

"DECREE.

Now, to-wit, November 4, 1933, pursuant to the adjudication filed yesterday in the above entitled case, it is hereby ordered, adjudged and decreed that policies of insurance No. 11,773,180, No. 11,773,181, No. 11,780,717 and No. 11,780,718, each in the sum of $5,000 written by the defendant on the life of Andy Adamos, be and they are each and all hereby cancelled and rescinded; that the defendant, the New York Life Insurance Company, be and it hereby is discharged from any liability whatsoever on account of any or all of said policies; that the plaintiff, George A. Adamos, forthwith surrender and manually deliver each and all of said policies of insurance to the defendant, or its counsel of record, Messrs. Smith, Buchanan, Scott & Gordon; and that the sum of $1184.36 paid into Court by the defendant be paid by the Clerk of this Court, less his poundage, to the plaintiff, George A. Adamos.

PER CURIAM:

S.

Eo die, exception noted to plaintiff and bill sealed.

F. P. SCHOONMAKER, (SEAL)
Judge."

Third: The learned Chancellor erred in his third finding of fact, which is as follows:

"3. In the said medical examination blank (copy of which is attached to the policies), Andy

Adamos was asked and answered the following questions, to-wit:

'7. A. Have you ever had any accident or injury or undergone any surgical operation? No.

B. Have you ever been under the observation or treatment in any hospital, asylum, or sanitarium? No.

D. Have you ever been found to have a high blood pressure? No.

F. Have you gained or lost in weight in the last year? No.

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

C. The Stomach or Intestines, Liver, Kidneys or Bladder? No.

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None.' "

Fourth: The learned Chancellor erred in his fourth finding of fact, which is as follows:

"That each of the answers quoted above in Paragraph 3 hereof is false, the actual facts being that on March 14, 1926, he fell while working for the Jones & Laughlin Steel Corporation, fractured certain of his lumbar vertebrae, fractured both of his femurs and his left tibia. As a result

of these injuries, he underwent a surgical operation by Dr. H. E. McGuire in South Side Hospital in Pittsburgh, where he was confined from March 14, 1926, to July 8, 1926. From the time of this accident until his death, Adamos collected Workmen's Compensation from the Jones & Laughlin Steel Corporation as for total disability."

Fifth: The learned Chancellor erred in his seventh finding of fact, which is as follows:

"7. In each of the policies of insurance in Part 1 of the application, (copy of which is attached to the policy), it is provided:

'It is mutually agreed as follows:

1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination.'

As a matter of fact, before the last two policies dated April 19, 1932, were delivered to Adamos, he had consulted a doctor and had been in the hospital. Dr. Hadley was called to attend him on April 18, 1932; and he was in the West Penn Hospital from April 21 to April 29, 1932, inclusive, where he was examined by a number of doctors."

Sixth: The learned Chancellor erred in his first conclusion of law, which is as follows:

"From these facts, we conclude, as a matter of law:

(1) That all the policies sued upon are voidable because of misrepresentation and fraud."

Seventh: The learned Chancellor erred in his second conclusion of law, which is as follows:

"From these facts, we conclude, as a matter of law:

(2) That the two policies dated April 19, 1932, are vitiated by reason of Adamos not having disclosed, when they were delivered to him the latter part of May, or the first of June, 1932, his medical history since his examination on April 6, 1932."

Eighth: The learned Chancellor erred in his third conclusion of law, which is as follows:

"From these facts, we conclude, as a matter of law:

(3) That the defendant is entitled to have the four policies sued upon delivered to it and cancelled."

Ninth: The learned Chancellor erred in his fourth conclusion of law, which is as follows:

"From these facts, we conclude, as a matter of law:

(4) That this equitable relief bar the plaintiff from any recovery upon the policies sued upon."

Tenth: The learned Chancellor erred in admitting evidence on behalf of the defendant, the question, answer, objection and exception being as follows:

"Q. Well, did he apparently understand your question?

A. He did.

Mr. Meyer:

I object, and ask that the question and answer be stricken from the record, because that is an expression of opinion that the doctor has not qualified himself to express.

The Court:

Well, if the man who was talking to another man cannot express an opinion as to whether or not they understood each other, I don't know who can. We overrule the objection.

Mr. Meyer:

Note me an exception, please.

The Court:

We note you an exception."

Eleventh: The Court erred in rejecting evidence on behalf of the plaintiff, the question, answer, objection and exception being as follows (p. 167 a of record):

"Q. This is a question that was asked Mr. Adamos: 'Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of: A. The brain or nervous system.' In your opinion, if that question had been asked Andy Adamos on April 6, 1932, or had been read to him as I have now read it to you, would Andy Adamos have understood the question that was then read to him?

Mr. Eckert:

Objected to, as incompetent, irrelevant and immaterial.

The Court:

We sustain the objection.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception."

Twelfth: The Court erred in not granting the plaintiff's motion to dismiss the equitable defense presented by the defendant, said motion, reasons, denial of the motion by the Court and exception are as follows (p. 147 a of record):

"*Mr. Meyer:*

Reserving the right to present testimony in answer to the testimony presented by the defendant, counsel for plaintiff now moves the Court to dismiss the equitable defense presented by the defendant in its testimony in the hearing now being had, for the following reasons:

1. The defendant has not proved that the policy was secured by the decedent from the defendant by fraud on his part;

2. The defendant has not shown that the questions asked of the applicant, now the decedent, by the examining physician of the defendant were understood by the applicant; nor have they shown that the answers given were wilfully given falsely;

3. The defendant has not shown that there was wilful and intentional misrepresentation of any material fact on the part of the applicant, now the decedent, in making application to the

company for the insurance upon which suit is brought;

4. The defendant, having shown that the applicant, now the decedent, was an ignorant, illiterate man so far as his ability to understand and speak English is concerned, did not show, or has not shown, that any effort was made by the company or any of its agents to fully inform the applicant of the nature of the application which was made and signed by him, nor of the meaning of the questions asked him, nor of the result upon his beneficiaries if he, the applicant, made untrue statements to any of the questions asked him.

The Court:

We deny this motion.

Mr. Meyer:

Note an exception.

The Court:

We note you an exception."

Thirteenth: The learned Chancellor failed to find in his findings of fact that the said Andy Adamos, the insured, was illiterate, unlearned, and did not understand the questions read to him by the examining physician for the insurance company.

Fourteenth: The learned Chancellor failed to find in his findings of fact that the copy of the application for insurance attached to the policies was not sufficiently legible to be in compliance with the Pennsylvania Statute of May 17, 1921, P. L. 682, Section 410-d.

Fifteenth: The District Court erred in making an order denying plaintiff's petition for rehearing and discharging plaintiff's rule to show cause why a rehearing should not be granted, said order and exception thereto being as follows:

"ORDER OF COURT.

Now, February 2, 1934, this case came on to be heard on a rule to show cause why plaintiff's petition for a rehearing of this case should not be granted, and on due consideration thereof, it is hereby ordered that said rule be, and is, hereby discharged, and that the plaintiff's petition for a rehearing be denied.

PER CURIAM:
SCHOONMAKER.

Same day, plaintiff excepts to this order. Exception noted and bill sealed.

F. P. SCHOONMAKER, (SEAL)
Judge."

Wherefore, plaintiff prays that the said decree may be reversed and for such other and further relief as to the Court may seem just and proper.

February 3rd, 1934.

JOHN D. MEYER,
ALAN S. CHRISTNER,
Attorneys for the Plaintiff.

Stipulation for Printing Record.

(Filed Feb. 26, 1934.)

And now, to-wit, February 26th, 1934, it is stipulated by and between counsel for New York Life Insurance Company, and counsel for the plaintiff, George A. Adamos, that the following portions of the record shall be incorporated into the record for the appeal in the above entitled case:

(1) Copy of docket entries.

(2) Statement of Claim, Affidavit of Defense and Replication, with the exception of Exhibits "A," "B," "C" and "D" in the Statement of Claim, for the reason that Exhibits "A," "B," "C" and "D" are exactly alike except

(a) For the respective numbers,
Exhibit "A"—11773180,
Exhibit "B"—11773181,
Exhibit "C"—11780717,
Exhibit "D"—11780718.

(b) That Exhibits "A" and "B" have the date the contract was signed as April 8th, 1932, on the first page, and Exhibits "C" and "D" have the date the contract was signed as April 19th, 1932, on the first page. In lieu of these Exhibits, it is stipulated and agreed between counsel that the following pages of Exhibit "A" necessary for the review of this case be incorporated in the record:
Pages 1 and 6.

(3) The Petition, Order of Court and Bond of the defendant company for removal of this case from the Court of Common Pleas of Allegheny County, to the Federal Court, shall not be printed as this procedure is not questioned by the plaintiff on appeal.

(4) The Petition, Answer and Order of Court for hearing in equity under Section 274-B of the Judicial Code (28 U. S. C. A. 398).

(5) The Opinion filed on Nov. 3, 1933, and Decree of this Court entered November 4th, 1933.

(6) The Petition of plaintiff for rehearing.

(7) Opinion and Order of Court entered February 2nd, 1934.

(8) Petition and Order for the Appeal.

(9) Assignments of Error.

(10) This Stipulation and Agreement of Counsel.

(11) Certificate of Clerk.

(12) The following Exhibits for the defendant: Exhibits "E," "F," "G," "H," "O," "P," "Q," "T."

(13) Copy of testimony.

JOHN D. MEYER,
ALAN S. CHRISTNER,
Attorneys for the Plaintiff.

SMITH, BUCHANAN, SCOTT & GORDON,
Attorneys for the Defendant.

Certificate of Clerk.

Western District of Pennsylvania, ss.:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above entitled case, so full and entire, as the same remains on record and file in my office in the City of Pittsburgh, in said district, in accordance with the notice filed by counsel.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said Court, at Pittsburgh, this ..... day of ....., A. D. 19....., and the Independence of the United States the 158th.

J. Wood Clark,

(seal) *Clerk.*

[fol. 257] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5436

GEORGE A. ADAMOS, Appellant,

vs.

NEW YORK LIFE INSURANCE CO., Appellee

And afterwards, to wit, the 7th day of May, 1934 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of July, 1934 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 258] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5436

GEORGE A. ADAMOS, Appellant,

v.

NEW YORK LIFE INSURANCE COMPANY, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed July 10, 1934

Before Buffington, Woolley and Davis, Circuit Judges

BUFFINGTON, *J.*:

In this case the beneficiary of four policies issued by the New York Life Insurance Company on the life of Andy Adamos, brought suit to recover thereon. In answer thereto the insurance company, in pursuance of Section 274 (b) of the Judicial Code, 28 U. S. C. A. 398, and in accord with Enelow v. New York Life Insurance Co., No.

5414 of this Court, 70 Fed. (2d) 728, prayed equitable relief by cancelling the policies in question on the ground of fraud. After testimony was taken the court found the decedent guilty of the alleged fraud, in that in his application for insurance he had falsely stated that he had not been treated by any doctors, whereas, in point of fact, by [fol. 259] his own admission, he had been under the care of several, and had been informed that he was suffering from probably fatal maladies.

After hearing and due consideration had, we agree with the Court below and find it had ample testimony on which to base its finding that a fraud had been committed. The judgment below is, therefore, affirmed.

A true Copy.

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 260] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5436

GEORGE A. ADAMOS, Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, Appellee

On Appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

Philadelphia, July 10, 1934.

Per Curiam.

Buffington, Circuit Judge.

Endorsements: Order Affirming Judgment with Costs. Rec'd & Filed July 10, 1934. Wm. P. Rowland, Clerk.

[fol. 261] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of George A. Adamos, Appellant, vs. New York Life Insurance Co., Appellee, No. 5436, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of October, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 260] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 12, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is advanced and assigned for argument on Monday, December 3 next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

OCT 8 19

CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452

GEORGE A. ADAMOS,
Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent
(Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

1124 Frick Building,
Pittsburgh, Pa.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

George A. Adamos, the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree (R.) of the United States Circuit Court of Appeals for the Third Circuit entered on July 10th, 1934, affirming the decree (R. 235) of the United States District Court for the Western District of Pennsylvania, dated November 4th, 1933, and made by Judge Schoonmaker, ordering that policies of insurance on which petitioner brought suit against the respondent be cancelled and rescinded.

Statement.

On December 22, 1932, petitioner filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania, to recover the sum of $20,000.00 on four life insurance policies, for the sum of $5,000.00 each, dated April 8, 1932, issued by respondent on the life of Andy Adamos, father of petitioner, in which policies petitioner was named beneficiary, the assured having died on July 6th, 1932 (R. 3).

On February 3, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 1).

On February 15, 1933, respondent filed an affidavit of defense (R. 9) in which it set up a defense that the insured obtained said policies by means of false and

fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On September 8, 1933, respondent filed a petition for a hearing in equity (R. 30), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure, without a jury, and preferably in advance of a jury trial at law, pursuant to Sec. 274 (b) of the Judicial Code (28 USCA Sec. 398). On the same day a rule was granted on petitioner to show cause why the prayer of the petition should not be granted.

On September 18, 1933, petitioner filed an answer to said petition in which he averred that the alleged equitable defense is not an equitable defense sufficient to transfer the suit from the law to the equity side of the court but that it is a defense of fraud triable at law and he therefore prayed that the petition be dismissed.

On October 9, 1933, the court entered an order making absolute the said rule to show cause. On the same day the court granted an exeeption to petitioner to said order.

On November 4, 1933, after hearing the alleged equitable issue under Sec. 274(b) of the Judicial Code, as chancellor, the court made a decree ordering the said policies to be cancelled and rescinded and the respondent discharged of all liability on account of said policies and directing petitioner to surrender said policies to respondent.

On July 10, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court entered on November 4, 1933.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398 printed in Appendix hereto) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Reasons Relied on for the Allowance of the Writ.

A.

This court has ruled that where a party has a good defense at law to a purely legal demand, he should be left to that means of defense; that where a life insurance company has been sued on a policy which it claims was obtained by means of false representations, it has

a plain, adequate and complete remedy at law by pleading that defense in the law suit and has no occasion to resort to a court of equity for relief. The order complained of overturns that rule upon an erroneous construction of the Act of March 3, 1915, section 274(b) of the Judicial Code (28 USCA Sec. 398).

B.

The order complained of denies a trial by jury in a case which, prior to the passage of the Act of March 3rd, 1915, was triable only before a jury.

C.

The Act in question, as this court has held, is a procedural statute. It does not confer new jurisdiction upon courts of equity. If it did, it would violate the Seventh Amendment to the Constitution of the United States.

D.

The proper construction of section 274(b) of the Judicial Code is of the highest importance. Whether it has the effect of abolishing the right of trial by jury in cases where the right existed prior to the enactment should be settled by this court.

E.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018, (certiorari denied, 289 U. S. 735).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

GEORGE A. ADAMOS

By

CHAS. H. SACHS

LOUIS CAPLAN

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is reported in 5 F. Supplement 1019 and is found at page 235 of the record. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 10, 1934. Jurisdiction to issue the writ is found in the provisions of Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

The principal facts are stated in the foregoing petition.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court, dated November 4, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated November 4, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

V.

Argument.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 9) nor in its petition for hearing in equity (R. 33), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy, or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and

Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Sehoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity, triable before a chancellor.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar.* That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardoza defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury".

Conclusion.

The use which has been made of Section 274 (B) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this Court shall so declare.

Respectfully submitted,

CHARLES H. SACHS
LOUIS CAPLAN
Counsel for Petitioner.

APPENDIX.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

— — — — —

SECTION 274b OF THE JUDICIAL CODE:

"Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (Mar. 3, 1915, c. 90, 38 Stat. 956.)

— — — — —

SECTION 384 OF THE JUDICIAL CODE:

"Suits in equity, when not sustainable. Suits in Equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." (R. S. §723; Mar. 3, 1911, c. 231, §267, 36 Stat. 1163.)

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS,
Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent
(Appellee Below).

REPLY BRIEF ON BEHALF OF PETITIONER.

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Reply Brief on Behalf of Petitioner.

This court, on October 8, 1934, granted a writ of certiorari in the case of Enelow vs. New York Life Insurance Company, No. 47 October Term, 1934, where the same question is involved. If the Enelow case is reversed, it naturally follows that the order made in this case (R. 35) is erroneous and should be reversed.

We will not be drawn into a contest on the false issue which respondent seeks to raise, viz: whether, if this case be tried before a jury, the Court would be bound to direct a verdict for respondent. That is not the question before the Court, nor do we anticipate that the Court will examine the whole record as it would if it were reviewing the case to determine whether the trial judge was correct in instructing the jury to find for respondent. However, since the alleged fraud was brought in, we want to call attention to just a few simple facts.

The assured was a Greek restaurant keeper, an "ignorant dumb foreigner", as one of respondent's own witnesses, a physician, admitted (R. 70). Another of respondent's witnesses, also a physician, testified that he could not carry on a conversation with the assured in English and used, in his talk with him, a few words of Greek that he knew (R. 85, 94). The assured applied for only $5,000 insurance (R. 218). The "defrauded" insurance company, following the well known custom, sent on *two* policies for $5,000 each, and, after succeeding in placing them, sent on two more unsolicited policies for $5,000 each which they persuaded the assured to accept (R. 129). How the insurance company's examining physician, who spoke only English, could make this ignorant man under-

stand the intricate questions in the application which contained medical terms and difficult words and expressions is a puzzle. Perhaps they were "Greek" to him.

The imposition upon this trusting insurance company must have been terrible. A glance at the application blank (R. 206, 209) will show that. Every question from 1 D to 11, both inclusive,—and they cover the whole subject of assured's habits, health and physical condition,—is answered in the negative. What a perfect specimen, from a physical, social and every other standpoint, they must have believed this 58 year old Greek restaurant keeper to be, for they always believe everything written in the application by their own agent, so they claim, no matter how unbelievable it may be to any one else.* It would be interesting, if the assured were alive, to hear his version of what happened; to learn whether even a third of the questions were put to him, whether the doctor explained to him the meaning of the questions that he was representing the assured as answering "no", whether the doctor asked him if he had ever in his life consulted a physician, for that is what questions 8 to 10 amount to, and, if he did, whether assured said that he had not.

When respondent's argument is examined it is found to contain the following admissions and statements, viz: (1) That no separate suit in equity may be maintained where there is a plain, adequate and complete

* Because it is a matter of public interest to protect and preserve the rights of beneficiaries of life insurance against just such claims by insurance companies, legislatures have made it compulsory for insurance companies to attach copies of the application to the policies so that the applicant might know what answers the agents wrote into the application. To circumvent the requirements of these statutes, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. An interesting case on the subject is New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037 (C. C. A. 3rd Cir.).

remedy at law. (2) That in Phoenix Mutual Life Insurance Co. vs. Bailey, 13 Wall. 516, the insurance company had a plain, adequate and complete remedy at law by pleading in the law suit which was brought against it that the policy was obtained by means of false and fraudulent answers in the application. (We say respondent admits this because it does not argue that this Court was wrong in the Bailey case.) (3) That such a defense is an equitable defense. (4) That respondent in this case has no adequate remedy at law.

Points 1 and 2 are consistent with each other and are, undoubtedly, correct, but points 3 and 4 contradict 1 and 2, and could not be right if 1 and 2 are correct.

Respondent says, in effect, that it is not concerned with the question whether it has a plain, adequate and complete remedy at law, but what it is interested in is a correct decision of the question "how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated" (7). No one disputes how a *real* equitable defense should be adjudicated under the judicial Code. It is plain as day. By this misstatement of the question involved, respondent hopes to avoid the necessity of showing that its defense is an equitable defense within the meaning of the statute,—that it is of a different character than the defense asserted in the Bailey case.

Respondent says: (8)

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the

> other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Citing authorities.)

There is nothing in this contention. The policy provides that all statements made by the assured "shall, in absence of fraud, be deemed representations and not warranties" (R. 8). Recognizing the effect of the above provision, and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent charged and pleaded such knowledge (Par. 21 Afft. of Def. R. 16). In view, therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers which it charged were knowingly and fraudulently made, and that only a court of equity can give it adequate relief, because in equity it can win its case by merely showing that the answers were material and untrue, without proving that they were made knowingly and with fraudulent intent. The fact that they obtain an order to try this case before a chancellor according to equitable procedure, surely does not change the *issues* in the case.

There is no real basis for claiming that a fraud in equity is different from a fraud in law. It is absurd to make the broad statement that when a party claims, in a suit in equity, that he was induced to do a certain thing by false and fraudulent statements, knowingly made to him, that the scienter need not be proven. We discussed this matter and analyzed the relevant cases in our brief in the Enelow case *(supra)*

where the same contention was made, and in the interest of brevity we omit it here.

Present counsel for petitioner were not concerned in the case prior to the filing of the petition for the writ of certiorari, but the former counsel for petitioner took an exception to the order of court directing the hearing before a chancellor (R. 35) and preserved their rights by assigning the order as an error (R. 245). There is nothing in their conduct that shows a waiver of their right of trial by jury.

> "In considering the question of waiver, a distinction must be made between an entire lack of matter of equitable cognizance, and cases within the field of equitable jurisdiction but in which an element essential to plaintiff's right to call upon the court for relief is lacking. Where the cause is entirely outside the field of equitable cognizance, the objection is not waived *by failure to interpose it at any particular time,* but is available at any stage of the proceeding." (Italics ours.)
>
> 21 C. J. sec. 149 (p. 168);
>
> Southern Pacific Co. v. U. S., 200 U. S. 341.

Finally, and to settle the matter, the lawfulness of the order directing this case to be heard before a chancellor according to equity procedure was litigated before the circuit court of appeals and respondent did not there take the position, *which it advances here for the first time,* that petitioner has waived his right to attack the order.

Respectfully submitted,

CHARLES H. SACHS,

LOUIS CAPLAN,
Counsel for Petitioner.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree (R. 258) of the United States Circuit Court of Appeals for the Third Circuit entered on July 10, 1934, affirming the decree (R. 235) of the United States District Court for the Western District of Pennsylvania, dated November 4, 1933, and made by Judge Schoonmaker, ordering that the policies of insurance on which petitioner brought suit against the respondent be cancelled and rescinded.

Opinions Below.

The opinion of the District Court is in 5 F. Supp. 278, (rehearing denied, 5 F. Supp. 1019), and is found at page 227 of the record. The opinion of the Circuit Court of Appeals is reported at 71 F. (2d) 997 and is found at page 257 of the record.

Jurisdiction.

Jurisdiction to review this case is found in the provisions of sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925 c. 229, sec. 1, 43 Stat. 938; (28 USCA sec. 347).

The statute involved is sec. 274 (b) of the Judicial Code (28 USCA Sec. 398, Act of March 3, 1915, c. 90, 38 Stat. 956) which provides as follows:

> "Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The judgment of the Circuit Court of Appeals was entered on July 10, 1934. The petition for a writ of certiorari was filed on October 8, 1934 and was granted on November 12, 1934. The said judgment affirmed the decree (R. 235) of the District Court, ordering that policies of insurance on which petitioner had brought suit against the respondent be cancelled and rescinded, the defense of fraud made in the affidavit of defense, in an action at law, having been heard by a chancellor according to equity procedure pursuant to an order made on October 9, 1933 (R. 35).

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be a violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Statement.

On December 22, 1932, petitioner filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania, to recover the sum of $20,000.00 on four life insurance policies for the sum of $5,000.00 each, dated April 8, 1932, issued by respondent on the life of Andy Adamos, father of petitioner, who died on July 6, 1932 (R. 3).

On February 3, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 1).

On February 15, 1933, respondent filed an affidavit of defense (R. 9) in which it set up the defense that the insured obtained said policies by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policies be surrendered, cancelled and rescinded.

On September 8, 1933, respondent filed a petition for a hearing in equity (R. 30), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure, without a jury, and preferably in advance of a jury trial at law, pursuant to Sec. 274(b) of the Judicial Code (28 USCA Sec. 398). On the same day a rule was granted on petitioner to show cause why the prayer of the petition should not be granted.

On September 18, 1933, petitioner filed an answer to said petition in which he averred that the alleged equitable defense is not an equitable defense sufficient to transfer the suit from the law to the equity side of the court but that it is a defense of fraud triable at law and he therefore prayed that the petition be dismissed.

On October 9, 1933, the court entered an order making absolute the said rule to show cause. On the same day the court granted an exception to petitioner to said order.

On November 4, 1933, after hearing the alleged equitable issue under Sec. 274(b) of the Judicial Code, as chancellor, the court made a decree ordering the said policies to be cancelled and rescinded and the respondent discharged of all liability on account of said pol-

icies and directing petitioner to surrender said policies to respondent.

On July 10, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court entered on November 4, 1933.

On November 12, 1934, this Court granted this writ of certiorari.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court dated October 9, 1933.

2. The Circuit Court of Appeals erred in not reversing the decree of the District Court entered November 4, 1933.

3. The Circuit Court of Appeals erred in affirming the decree of the District Court dated November 4, 1933.

4. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should have been denied.

Summary of Argument.

Section 274 (b) of the Judicial Code (28 USCA sec. 398) does not authorize the application made by respondent to have its defense of fraud made in its affidavit of defense, in an action at law, heard by a chancellor, according to equity procedure.

Respondent, on the facts presented by the record, has no right to equitable relief.

If section 274 (b) of the Judicial Code is to be construed as to extend the jurisdiction of the federal equity court to situations over which it had no jurisdiction prior to said enactment, it is in violation of the seventh amendment to the constitution of the United States.

ARGUMENT.

Completeness of respondent's remedy in law suit.

Petitioner is the only person having an interest in the policies sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policies. Respondent has not, in its affidavit of defense (R. 9), or in its petition for hearing in equity (R. 30), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied

a preventative remedy or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

> "A charge of fraud or false representation will not give a court of equity jurisdiction where complete relief on that ground can be obtained in a court of law. See Adams v. Jones (C. C. A.) 11 F. (2d) 759, and authorities there cited, including the leading case of Buzzard v. Houston, 119 U. S. 347, 7 S. Ct. 249, 30 L. Ed. 451."

> Central Florida Lumber Co. v. Taylor-Moore Syndicate, 51 F. (2d) 1.

> "Court of equity should not order cancellation of insurance policy procured by fraud, where facts indicate that fraud could be used as defense to action at law on policy. (28 USCA Sec. 384.)"

> Harnischfeger Sales Corporation v. National Life Ins. Co., 72 F. (2d) 921 (C. C. A. 7).

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92 and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that

it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policies before the statute was enacted, it cannot now have its defense treated as a controversy in equity triable before a chancellor.

Meaning of "Equitable defense" as used in statute.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar.* That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardozo defined "equitable defenses" in Petrogradsky Mejdunarodny Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*'" (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

Only formal distinction abolished.

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles, and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury."

In Smith v. American Nat. Bank, 89 Fed. 832 (C. C. A. 8th Cir.) the court, at page 838, after quoting the seventh amendment of the constitution,* said:

> "The effect of this provision is to declare that the right of trial by jury shall depend neither on legislative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law."

In Union Pacific Railroad Company vs. Syas, 246 Fed. 561, 565, (C. C. A., 8th Cir.), the court said:

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* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment VII to the Constitution of the United States.

> "This statute (sec. 274b of the Judicial Code) brings into the federal courts the procedure that has long prevailed in many of the states where Codes of Civil Procedure have been adopted. The statute is intended to prevent a circuity of action by allowing the rights of either party to an action at law, whether legal or equitable, in respect to one subject-matter, to be determined in one action; but, while the statute permits the granting of equitable relief in an action at law, Congress did not intend, in our opinion, to change in any way, except as to procedure, the essential distinction between law and equity. Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, and Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800."

Conflicting constructions of Sec. 274(b).

In the case of New York Life Insurance Company vs. Miller, decided by the Circuit Court of Appeals of the 8th Circuit on October 25, 1934, (not yet reported,—for copy of opinion see Appendix), the facts were as follows:

Gertrude V. Miller brought an action against the insurance company to recover on two policies of insurance. The defendant filed an *answer setting out the same defense* as was interposed by respondent in this case. The defendant also filed a cross-bill praying for a decree of rescission and for general relief. In the replication to the cross-bill, plaintiff admitted that the assured had made the answers to the questions as alleged and denied their falsity and materiality, etc., and also alleged that the defendant had an adequate remedy at law. When the case was reached for trial, the defendant moved that the case be set for trial before the court on the equitable issues tendered for trial by the cross-bill. This motion was overruled and an exception noted. Later trial was

had to a jury resulting in a verdict and judgment for the plaintiff. The Circuit Court of Appeals affirmed the action of the district court.

The Circuit Court of Appeals for the Fifth Circuit had before it the question here involved in the cases of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018 (certiorari denied 289 U. S. 735), and Phillips-Morefield, et al. v. Southern States Life Insurance Company, 66 F. (2d) 29, and reached diametrically opposite conclusions in the two cases.

In the American Cyanamid case the defendant, after filing an answer to a law action, filed a so-called equitable plea which alleged fraud and prayed the court, sitting as chancellor, to take jurisdiction, require a reply as provided by statute, and, on final trial, annul and cancel the plaintiff's claim, and that, pending such determination as the chancellor will make, proceedings on the law side of the court be suspended as though enjoined by bill in equity. In refusing the prayers, the court, at page 1020, said:

> "Equity is not over objection to assume jurisdiction because of either (equitable estoppels and questions of fraud) if the remedy at law is plain, adequate and complete; *nor will a prayer for an unnecessary cancellation serve as an excuse* (citing cases). The prayer for a cancellation of Wilson & Toomer Company's claim against Cyanamid Company may be put aside. A judgment at law for the defendant will effectually end it. One for the plaintiff will merge it. There is no written instrument capable of future harm to be cancelled." (Italics ours.)

In the Phillips-Morefield case, the court said:

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the

> ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of N. Y. Life Ins. Co. v. Marshall, 23 F. (2d) 225, decided by this court, and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 USCA Sec. 398)."

The opinion in the American Cyanamid case, we submit, is well reasoned. The opinion in the Phillips-Morefield case gives no reason for its conclusion. It merely says the situation is now different from what it was when the cases of N. Y. Life Insurance Co. v. Marshall, 23 F. (2d) 225 and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616 were decided because of the passage of the Act of March 3, 1915, section 274(b) of the Judicial Code. It does not explain in what respect the situation is now different. Its strange conclusion is at variance with what this court said in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235.

The Circuit Court of Appeals in our case disposed of this question in a sentence, as follows (R. 257):

> "In answer thereto the insurance company, in pursuance of Section 274(b) of the Judicial Code, 28 U. S. C. A. 398, and in accord with Ene-

> low v. New York Life Insurance Co., No. 5414 of this Court, 70 Fed. (2d) 728, prayed equitable relief by cancelling the policies in question on the ground of fraud."

In the Enelow case, *supra*, the court, in a *per curiam* said:

> "The purpose of the Act was to do away with the necessity of appealing to a Court of Equity as such by permitting equitable defenses to be pleaded and heard in all actions at law. There was no need for such an Act in Pennsylvania for the reason that equitable defenses were always permitted in actions in assumpsit in that State and were determined by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor. The Act of Congress applies to actions in Pennsylvania whether needed or not."

It was not our contention in the Enelow case that the order appealed from was improper because the statute was not needed in Pennsylvania. We based our objection on the ground that respondent had an adequate remedy at law and that it could not have invoked the aid of a court of chancery to grant it relief. If the cause had been permitted to remain in the Pennsylvania court, it would not be tried "by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor". It is difficult to perceive how a court and jury could sit as a chancellor. If this case were tried before a court and jury in Pennsylvania, their respective functions would be precisely the same as that of a court and jury in any other law suit. The jury would not be sitting, merely, to advise the conscience of a chancellor. Their verdict, on the facts, would be as binding as in any action at law.

New York Life Insurance Company vs. Marotta, 57 F. (2d) 1038, (C. C. A. 3rd Cir.), did not have our side of the case presented to the Circuit Court of Appeals. We have examined the appellees' brief in that case and find that the appellees entirely ignored the question whether, under a situation such as presented here, the court could under sec. 274(b) of the Judicial Code dispose of the defense as a case in equity. This proposition was Point III of the appellant in that case. What the appellees had to say on that point is found on pages 16 to 18 of their brief. They seem to go along with the appellant, the insurance company, on that question, and therefore do not refer to the cases which hold that in such a situation the defendant has an adequate and complete remedy at law, and that being so, for the court to dispose of the defense of fraud, sitting as a court of equity, would offend against the Seventh Amendment to the Constitution of the United States. The only thing they did say upon the subject was that, according to the record, the court acting *as a chancellor* did *apparently* dispose of that issue. The court only heard one side of that question,—the insurance company's side.

The editor of the United States Code Annotated, in a note to Title 28, sec. 398, in the 1933 Cumulative Annual Pocket Part makes a conjecture that the word "of" was inadvertently used in sec. 274(b) of the Judicial Code for the word "or". That statement is due to a superficial reading. It is plain that the draftsman of the Act was referring to a defense which embodied a prayer for equitable relief, that is, affirmative relief. The sentence would be crude if it read as suggested, namely, "The defendant shall have the same rights in such case as if he had filed a bill em-

bodying the defense *or* seeking the relief prayed for in such answer or plea." The draftsman did not mean a defense which consisted of nothing more than an assertion that a money judgment should not be entered against the defendant because the instrument sued on was obtained from him by fraud. That he used the right word cannot be open to doubt when the purpose sought to be accomplished by the statute is perceived. The editor says that the word "of" appears in the original statute.

Exceptions to rule against bills to cancel.

We do not contend that insurance companies can under no circumstances file bills to cancel policies on the ground of fraud. When a policy contains a provision that it shall be incontestable, except for nonpayment of premiums, after a certain period, courts have allowed insurance companies to make a contest, within the contestable period, by filing a bill to cancel. The ground for jurisdiction over such bills, however, is not as counsel for respondent claims "because the defense is clearly an equitable one", for, as we have shown, this court in the case of Phoenix Mutual Life Insurance Company vs. Bailey, *supra*, said that federal courts of equity do *not* have jurisdiction of bills to cancel policies for fraud where that charge can be made fully effective as a defense to a suit at law. In other words, it was because of an entirely different principle of equity jurisprudence that the bills were entertained, viz.: that the plaintiff had *no* adequate remedy at law for it was within the power of the holder of the policy to postpone the bringing of the suit until after the contestable period had expired.* And even if a suit

* Harnischfeger Sales Corporation v. National Life Ins. Co. supra.

to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them.

In all of the *reported* cases, except one, that we have come across where a bill to cancel a policy was sustained, the bill was either filed *before* the lawsuit was brought on the policy, or if it was filed after the suit the lawsuit *did not have in it as plaintiffs* all of the persons having an interest in the policy. The overwhelming number of cases where federal courts have held that bills to cancel policies were maintainable were those of the first class above referred to, namely, those in which the bill was filed *before* any action at law was instituted.

In New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, the court held that the "contest" contemplated in incontestable clauses of life insurance policies may be made either by equitable action to cancel policy or by answer in the suit at law brought to recover under the policy, citing a number of cases which it termed "the great number and weight of authority" on the point.

The point of that decision is that what the respondent in this case has done, namely, to file a defense setting up the alleged fraud, *is* the initiation of a contest; that it *had* put itself within the protection afforded it by the policy, and that regardless of whatever becomes of that lawsuit, respondent has made a contest within

the contestable period upon the grounds set forth in the affidavit of defense. There is therefore gone, so far as this case is concerned, *the entire basis* upon which courts of equity have been entertaining bills to cancel insurance policies.

As stated, the Hurt case also belongs to the second class of cases referred to by us above, cases where the insurance company pleads that it ought to be allowed to maintain a bill, notwithstanding the institution of the prior lawsuit, because it is seeking relief *against someone else besides the plaintiff in the lawsuit.* That cannot be here. If the policy in the case at bar be cancelled by a chancellor, the decree runs against the plaintiff in the lawsuit,—no one else.

In the Hurt case the *assignees* of an insurance policy first brought an action at law. The company then *filed a bill* praying cancellation for fraud not only against the assignee, but also against the widow as "the first person to be entitled to be named as administrator of the estate of" the assured. The court said on this point (p. 95):

> "Does the fact that the defense might have been made by answer, within the period, nullify the effect of filing the equitable action and thus deprive the company of the defenses set up in such action? We think not under the circumstances of this case. Here the law action on the policy was brought by the assignees thereof alone. The policy was assignable, but was issued in favor of 'The Executors, Administrators or Assigns of the Insured, or to the duly Designated Beneficiary.' The company had the right to protect itself against all claims from any one upon the policy. In the law action, such protection was only against the assignees who were the only plaintiffs therein at the time. The only way in which it could be sure of complete protection was by bringing

its equitable action and making the administratrix a party thereto."

There was considerable of a complication in that case. The assignees of the policy brought the law action first. The company then filed a bill to cancel, but within the contestable period. It also filed an answer to the law suit, but this answer was filed *after* the expiration of the contestable period. The answer included the matters averred in the bill. Thereafter the two cases were consolidated. The lower court *denied* a motion of the company to proceed to a hearing in the equity suit and *sustained* a motion for judgment for the plaintiffs in the law action *because the answer to the law action was filed after the contestable period had expired.* In other words, the lower court held at one and the same time that the bill should be dismissed because the complainant had at the time it was filed an adequate remedy at law, to wit, a right to attack the policy in the law suit, and deprived the company of the defense of fraud in the law action because the answer to the law action was filed too late. The Circuit Court of Appeals reversed and said the proper procedure under the circumstances here was to try the law case before acting upon the equitable action but in a trial of the law case the equitable defense should have been first disposed of. Under the special and extraordinary circumstances of that case we do not question the correctness of the action of the Circuit Court of Appeals in not following the lower court, *which denied the insured a chance to present its defense of fraud in either action.*

In Peake vs. National Life Insurance Co., 15 F. (2d) 303 (C. C. A. 8th Cir.), the court sustained a bill to cancel which was filed *before* a law suit, but made it

clear that it would have dismissed the bill, if *the law suit* had been, as in the case at bar, filed first. The court said:

> "Appellants contend that (1) Mrs. Peake's claim is a legal demand and appellee could make its defense of fraud and deceit to that action as a legal defense, and thus had a remedy at law, Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; (2) the insurer's claimed equitable right and remedy are fully set up in an answer to Mrs. Peake's action, filed within the two years' time named in the incontestable clause of the policy, and those rights can be adjudicated in that action, hence there was no occasion to enjoin the prosecution of that action, U. P. Ry. Co. v. Syas, 246 F. 561, C. C. A. 531; and (3) * * *
>
> *"If Mrs. Peake had brought her action before the equity suit had been instituted, and if it were established that she and the insurer were the only parties interested in the subject, the first two propositions contended for might be conceded as sound."* (Italics ours.) Opinion, pp. 304, 305.

Respondent says in its brief in opposition to certiorari (p. 7): "There was no provision in the law when those cases (Phoenix Mutual, *supra*, Cable, *supra*, Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Babin, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the defense? Or does it mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of section 274(b) of the Judicial Code?

Respondent says:

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Brief of Respondent in Opposition to Certiorari 8.)

There are two answers to this contention. In the first place, the policy provides (R. 8):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent charged and pleaded such knowledge (Para. 21 Aff't of Def. R. 16).

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers claimed to have been *knowingly and fraudulently* made and

that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of court that this case be tried by a chancellor according to equitable procedure, they have gotten the issues made up by the pleadings changed in some manner, so that they did not have to prove *all* of the facts which they set out as their defense in the affidavit of defense.

"Innocent" fraud.

In the next place, it is difficult to conceive such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the court said that even though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds to be true.

What this court said in the Smith-Richards case, *supra*, on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believe to be true, is equally, in morals and *law*, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a court of law, to refund the considera-

tion that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has cancer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and that a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this principle that there was inserted in the policy the provision cited above: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra*, was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge*. He would

have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement have made the answer a warranty. And as this was not done, the court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The illuminating opinions in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) and in New York Life Insurance Company vs. Miller, *supra*, will help to clear away the confusion. The cases merely hold that the action for deceit at common law is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit,—fraud—of which the scienter is an indispensable element, in a bill in equity, if deceit or fraud is therein charged. The Kimber case shows many instances of *charges* of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

Sufficiency of testimony to go to jury not question before court.

We will not be drawn into a contest on the false issue which respondent sought to raise in his brief in opposition to the petition for writ of certiorari, viz: whether if this case be tried before a jury, the Court would be bound to direct a verdict for respondent. That is not the question before the Court, nor do we anticipate that the Court will examine the whole record as it would if it were reviewing the case to determine whether the trial judge was correct in instructing the jury to find for respondent. However, since the alleged fraud was

brought in, we want to call attention to just a few simple facts.

The assured was a Greek restaurant keeper, an "ignorant dumb foreigner", as one of respondent's own witnesses, a physician, admitted (R. 70). Another of respondent's witnesses, also a physician, testified that he could not carry on a conversation with the assured in English and used, in his talk with him, a few words of Greek that he knew (R. 85, 94). The assured applied for only $5,000 insurance (R. 218). The "defrauded" insurance company, following the well known custom, sent on *two* policies for $5,000 each, and, after succeeding in placing them, sent on two more unsolicited policies for $5,000 each which they persuaded the assured to accept (R. 129). How the insurance company's examining physician, who spoke only English, could make this ignorant man understand the intricate questions in the application which contained medical terms and difficult words and expressions is a puzzle.

The imposition upon this trusting insurance company must have been terrible. A glance at the application blank (R. 206, 209) will show that. Every question from 1 D to 11, both inclusive,—and they cover the whole subject of assured's habits, health and physical condition,—is answered in the negative. What a perfect specimen, from a physical, social and every other standpoint, they must have believed this 58 year old Greek restaurant keeper to be, for they always believe everything written in the application by their own agent, so they claim, no matter how unbelievable it may be to any one else. It would be interesting, if the assured were alive, to hear his version of what

happened; to learn whether even a third of the questions were put to him, whether the doctor explained to him the meaning of the questions that he was representing the assured as answering "no", whether the doctor asked him if he had ever in his life consulted a physician, for that is what questions 8 to 10 amount to, and, if he did, whether assured said that he had not.

Because it is a matter of public interest to protect and preserve the rights of beneficiaries of life insurance against just such claims by insurance companies, legislatures have made it compulsory for insurance companies to attach copies of the application to the policies so that the applicant might know what answers the agents wrote into the application. To circumvent the requirements of these statutes, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. Interesting cases on the subject are New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037, and New York Life Insurance Company v. Miller, *supra,* (p. 12 of Appendix).

In this connection, in New York Life Insurance Company vs. Miller, *supra,* the Circuit Court of Appeals held that there was no error in overruling defendant's motion for an instructed verdict, the court having submitted to the jury the question whether the copies of the application attached to the policies were legible copies.

Petitioner has always maintained his right to jury trial.

Present counsel for petitioner were not concerned in this case prior to the filing of the petition for the writ of certiorari, but the former counsel for petitioner filed an answer denying that respondent's defense was equitable and asserting that it was a defense of fraud triable at law. They also took an exception to the order of court directing the hearing before a chancellor (R. 35) and preserved their rights by assigning the order as an error (R. 245). There is nothing in their conduct that shows a waiver of their right of trial by jury.

> "In considering the question of waiver, a distinction must be made between an entire lack of matter of equitable cognizance, and cases within the field of equitable jurisdiction but in which an element essential to plaintiff's right to call upon the court for relief is lacking. Where the cause is entirely outside the field of equitable cognizance, the objection is not waived *by failure to interpose it at any particular time,* but is available at any stage of the proceeding." (Italics ours.)
>
> 21 C. J. sec. 149 (p. 168);
>
> Southern Pacific Co. v. U. S., 200 U. S. 341.

Finally, and to settle the matter, the lawfulness of the order directing this case to be heard before a chancellor according to equity procedure was litigated before the Circuit Court of Appeals and respondent did not there take the position, *which it advanced, for the first time,* in its brief in opposition to the petition for a writ of certiorari, that petitioner has waived his right to attack the order.

CONCLUSION.

If section 274 (b) of the Judicial Code is to be used as it was in this case, federal courts of equity will take away from courts of law jurisdiction over hundreds of cases wherein the right to trial by jury has never been questioned. It will be used in any case where the defendant claims fraud was practiced on him. It will be used even in cases where the defendant claims a breach of warranty or representation, for when we come to examine respondent's contention we find that it STARTS by claiming that it is entitled to go into equity because its defense of fraud is "equitable" and ENDS with arguing that it ought to be allowed in equity because, after it is there, it can abandon its claim of fraud and get along with proof of something else,—a breach of a representation.

Such a use of the statute is a perversion of its purpose. It was on the books for about fifteen years before it occurred to anyone to misuse it in this fashion.

Respectfully submitted,

CHARLES H. SACHS,

LOUIS CAPLAN,

Counsel for Petitioner.

APPENDIX.

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 9918 at Law. October, 1934, Term.

NEW YORK LIFE INSURANCE COMPANY,
Appellant,

vs.

GERTRUDE V. MILLER,
Appellee.

Appeal from the District Court of the United States for the Northern District of Iowa.

Mr. Clifford V. Cox and Mr. Donald Evans (Mr. Wm. F. Riley and Mr. John Inghram were with them on the brief) Attorneys for Appellant.

Mr. L. H. Salinger (Mr. Edwin A. Wissler and Messrs. Salinger, Reynolds and Myers were with him on the brief) Attorneys for Appellee.

Before Booth, Circuit Judge, and Munger and Bell, District Judges.

Munger, District Judge, delivered the opinion of the Court.

The appellee had a verdict and judgment against the appellant in an action upon two policies of insurance. The parties will be referred to as they appeared in the trial court. The defendant's answer alleged that the assured had obtained the policies by making, knowingly, false representations, consisting of untrue answers to

questions propounded to him in his written application for the policies and the same facts were also alleged in a cross bill, with allegations that upon discovery of the falseness of the representations the defendant had tendered to plaintiff the premiums which it had collected and had notified her that it had elected to rescind the policies. The prayer asked for a decree of rescission of the policies and for general relief. In her replication to the cross bill, the plaintiff admitted that the assured had made the answers to the questions, as alleged, but denied their falsity and materiality, and denied that the policy was issued in reliance upon them. **It also alleged that the defendant had an adequate remedy at law. When the case was first reached for trial the defendant moved that the case be set for trial before the court on the equitable issues tendered for trial in the cross bill. This motion was overruled, and an exception noted.** Thereafter a jury was empanelled in the case and following this the plaintiff was given leave to amend her replication, and in her amendment the plaintiff alleged, in substance, that the copies of the application which were attached to the policies, when the policies were delivered to the assured, were not copies, because illegible. It does not appear that a verdict was reached by the jury at that time, but, one year later, a trial was had to a jury, resulting in the verdict and judgment mentioned.

It is assigned as error that the court overruled the defendant's motion asking for a trial of the equitable issues set forth in the cross bill before the trial of the legal issues. **The trial court held that the defendant had an adequate remedy at law.** The appellant's claim that this was erroneous finds some support in the case of New York Life Insurance Company v. Marotta, 57 Fed. (2d) 1038, 1039. In that case it appeared that an action at law had been brought to recover upon two life insurance policies, after the death of the insured. The defendant's answer alleged that the policies were procured by means of false and fraudulent answers given by the insured to questions propounded to him in his application for the

insurance, and prayed for a rescission and cancellation of the policies. The trial court made an order dismissing the equitable defenses because the defendant had an adequate remedy at law, but this order was reversed by the Court of Appeals. The reason for the reversal was stated in this language:

> "There is a clearly marked difference in the elements of proof necessary to support fraud as a defense to an action at law, and fraud as a ground for the equitable relief of rescission and cancellation. This distinction the court did not appear to recognize. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party, at the time when he makes it; but the courts have clearly and repeatedly recognized that there may be actual fraud in equity, without any feature of moral culpability.
>
> The person making an untrue statement without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Of course, whatever would be fraudulent at law is fraudulent in equity; but the equitable doctrine goes further, and includes instances of fraudulent misrepresentations which do not exist at law. At law there must be a showing, not only of the falsity of the allegation, but also knowledge by the applicant of such falsity. As a general rule, courts of equity may grant relief by way of rescission, abatement, or otherwise, although no fraudulent intent on the part of the person making the representation is shown, and even though he may be honestly misled as a result of misapprehension or mistake. All that need be shown in such case is that the representations were false, and actually misled the person to whom they were made. A very large number of cases sustaining these distinctions are set forth in the appellant's brief, and need not be cited here. These authorities sustain the distinction which exists between fraud at law and fraud in equity so clearly as to remove the question beyond the domain of controversy. While it pretty clearly appears from the record that a number of the material questions answered by the applicant were untrue, under all the circumstances, there being a conflict of evidence, we think the court was right in submitting the

question to the jury as to the existence or nonexistence of legal fraud; particularly as to whether or not the applicant was suffering from, and had been treated for, gout, and, if so, whether he had knowledge of the fact that he was treated for that disease. But that is only a portion of the case. Either prior to the submission of the case to the jury, or afterwards, under the pleadings, it was the duty of the court to find the facts upon which the equitable defenses were based, and, if the findings showed that the applicant's answers were untrue and material, it was the duty of the court to apply to those facts the equitable principle that such false representations were fraudulent, and entitled the defendant to a rescission of the policies, even though the applicant believed the answers to be true when he made them."

In Derry v. Peek, 14 App. Cases, 337, 359, Lord Herschell stated the distinction in the elements of proof between actions at law for deceit, and suits in equity for rescission, as follows:

"This action is one which is commonly called an action of deceit, a mere common law action. This is the description of it given by Cotton, L. J. in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and must be relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit."

In McFerran v. Taylor, 3 Cranch 270, which was a suit for specific performance, Chief Justice Marshall said:

> "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance."

The case of Smith v. Richards, 13 Pet. 26, was a suit for a rescission of a contract to purchase a tract of land, upon which was a gold mine, upon the ground, alleged by the purchaser as the plaintiff, that he had been induced to make the contract by false representations of the seller. The court said:

> "It is an ancient and well-established principle, that whenever suppressio veri or suggestio falsi occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance. This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text-writer on equity. In 1 Madd. Chan. 208, it is thus stated: If, indeed, a man, upon a treaty for any contract, made a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the chancellor, in the case of Neville v. Wilkinson, L Bro. C. C. 546, with the exception of the words, whether knowingly or not; and the part of the proposition embraced by these words, is founded upon the case of Ainslie v. Medlycott, 9 Ves. 21, which fully sustains Mr. Maddock. In this latter case, the following strong language is used. 'No doubt, by a representation, a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt, he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts no doubt he is bound; though his mistake was perfectly innocent.'
>
> But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer

on equity; one who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject, and marks, with particularity, the modifications which belong to it. In 1 Story's Equity, 201-2, it is thus stated. 'Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case, there is a positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; dolum malum, ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.' Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion, without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise, and imposition on the other party. Or, as Lord Thurlow expresses it, in Neville v. Wilkinson, 'it misleads the parties contracting, on the subject of the contract.'"

The principle stated in these cases that it is immaterial in an equitable suit for rescission or cancellation of a contract, whether the false representation inducing its execution was made with knowledge of its falsity or was made with an honest belief that it was true, has been stated in many decisions in the Courts of the United States. Doggett v. Emerson, 3 Story 700, Fed. Cases 3960; in re American Knit Goods Mfg. Co., 173 Fed. 480, 482; Grant v. Giffrida, 267 Fed. 330, 332; New York Life Ins. Co. v. Marotta, 57 Fed. (2d) 1038, 1039; Kell v. Trenchard, 142 Fed. 16, 23; Halsey v. Minnesota-South Carolina Land & Timber Co., 28 Fed. (2d) 720, 723; Franco v. New York Life Ins. Co., 53 Fed. 562, 565; Hindman v. First Nat. Bank, 112 Fed. 931, 944; Joslyn v. Cadillac Automobile Co., 177 Fed. 863, 867; Independent Harvester Co. v. Tinsman, 253 Fed. 935, 937; Hersch-

berger v. Woodrow-Parker Co., 275 Fed. 908, 916; Billings v. Aspen Mining & Smelting Co., 51 Fed. 338, 347; Kimber v. Young, 137 Fed. 744, 747; City of Omaha v. Venner, 243 Fed. 107, 113; Fay v. Hill, 249 Fed. 415, 419; Woods-Faulkner & Co. v. Michelson, 63 Fed. (2d) 569, 572. See also Hare v. Chase, 49 Fed. (2d) 447, 454; Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 Fed. 888, 892; Benton v. Ward, 47 Fed. 253, 256; Burroughs Add. Mach. Co. v. Scandinavian-American Bank, 239 Fed. 179, 183.

In the case of Insurance Co. v. Bailey, 13 Wall. 616, the insurance company after the death of the assured had filed a bill asking for the cancellation of two policies of insurance which it had issued upon the life of Albert Bailey. The bill alleged that the policies had been procured by the suppression of material facts and by fraudulent misrepresentations. In affirming a dismissal of the bill the court said:

> "Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the cestui que vie the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. (* Foley v. Hill, 2 House of Lords Cases, 45; Thrale v. Ross, 3 Brown's Chancery Cases, 56; Arundel v. Holmes, 4 Beavan, 325; Norris v. Day, 4 Young & Collyer, 475.

> Where the party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he had no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under reexamination.
>
> Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand,' and nothing appears to show that the defence at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the Judiciary Act."

In the case of Cable v. United States Life Insurance Company, 191 U. S. 288, the insurance company had brought suit in the United States court seeking cancellation of a policy of life insurance which it had issued on the life of Herman D. Cable, alleging that the policy had been procured by fraud and by false representations. Before that suit was filed an action had been begun in the State court, by the beneficiary in the policy, asking for a recovery upon the policy. The bill alleged the lack of an adequate remedy at law, in that a removal of the action on the policy was impracticable, because an Illinois statute declared that a removal of such a case would forfeit the company's right to transact business in Illinois; and alleged that the laws of Illinois, as interpreted by the State courts, were less favorable, on the facts of the case, than the laws applied in the United States courts. In its decision the Supreme Court stated that the plaintiff's bill had alleged that the policy was procured by the fraud and fraudulent representations of the agents

of the assured, and dismissed the question of the adequacy of any remedy at law, referring to the decision in the Bailey case as controlling. The court said:

> "We start with the proposition that, to any action brought upon the policy in a Federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the Federal court, but, on the contrary, the administratrix has commenced her action in the state court, and hence the defence, if made in the state court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defence within the same jurisdiction by removing the case from the state to the Federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into could prevent the removal of the case in the exercise of its constitutional right. This has been so held in Insurance Co. v. Morse, 20 Wall. 445, and that case has been repeatedly approved. See Doyle v. Continental Insurance Co., 94 U. S. 535; Barron v. Burnside, 121 U. S. 186.
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> * * * * * * * * *
>
> One thing is entirely clear, that the company could have removed this case from the state to the Federal Court, notwithstanding the state statute or anything contained in its application for a license to do business within the state. Upon removal the company would have the full and adequate defense under the law as administered by the Federal courts that it would have in the equity case."

In the decision the court referred approvingly to the cases of Home Ins. Co. v. Stanchfield, 1 Dillon 424, Fed. Cases 6660, and Aetna Life Ins. Co. v. Smith, 73 Fed. 318, in each of which the court had declared that bills to cancel insurance policies on the ground of false representations could not be maintained because the remedy at law was adequate, when the bill was filed after a loss had occurred under the policy.

Before the decision in the Marotta case, it had been held, in cases which cited the Bailey and Cable cases that an insurance company ordinarily had an adequate remedy at law, by setting up its defense in an answer alleging that the policy had been procured by false representations, when an action had been begun against it on the policy, after a loss had occurred under the policy. Continental Casualty Co. v. Yerza, 16 Fed. (2d) 473, 474; New York Life Ins. Co. v. Marshall 23 Fed. (2d) 225; New York Life Ins. Co. v. Feight, 29 Fed. (2d) 318, 320; New York Life Ins. Co. v. Seymour, 45 Fed. 47, 48; Riggs v. Union Life Ins. Co., 129 Fed. 207, 208.

The right to maintain an equitable action to rescind or cancel a contract of insurance, because of false representations made by the assured to induce its execution, where there is no adequate remedy at law, is well recognized. Riggs v. Union Life Ins. Co., 129 Fed. 207; Jefferson Standard Life Ins. Co. v. Keeton, 292 Fed. 53, 54; Jefferson Standard Life Ins. Co. v. McIntyre, 294 Fed. 886, 888; Jones v. Reliance Life Ins. Co., 11 Fed. (2d) 69, 70; Peake v. Lincoln Nat. Life Ins. Co., 15 Fed. (2d) 303, 305; Keystone Dairy Co. v. New York Life Ins. Co., 19 Fed. (2d) 68, 69; New York Life Ins. Co. v. McCarthy, 22 Fed. (2d) 241, 245; Adler v. New York Life Ins. Co., 33 Fed. (2d) 827; New York Life Ins. Co. v. Hurt, 35 Fed. (2d) 92, 96; Lincoln Nat. Life Ins. Co. v. Hammer, 41 Fed. (2d) 12, 16; Equitable Life Assur. Soc. of U. S. v. Schwartz, 42 Fed. (2d) 646, 648; New York Life Ins. Co. v. Seymour, 45 Fed. (2d) 47, 48; Brown v. Pacific Mut. Life Ins. Co., 62 Fed. (2d) 711, 712; Phillips-Morefield v. Southern States Life Ins. Co., 66 Fed. (2d) 29, 30; Penn Mut. Life Ins. Co., v. Joseph, 5 Fed. Supp. 1003, 1006; Massachusetts Protective Ass'n v. Stephenson, 5 Fed. Supp. 586, 590.

The right to maintain such a suit, as illustrated by the cases cited, often arises from the fact that a defense at law in an action on the policy may be lost to the insurer, because of the uncertainty when a loss may occur, the danger that witnesses may disappear, or because the

policy will become incontestable after a limited period unless such a suit is begun by the insurer.

If an insurer is entitled to ask the equitable relief of rescission or cancellation of a policy which it has issued, on the ground that it was procured by fraudulent representations of the insured, solely because the elements of proof in such a suit differ from the elements of proof in making the defense in an action on the policy, it is needless in any case to bring suit for that relief before the incontestable period has expired, or before a loss has occurred, or to show that essential testimony may be lost, or to show that any other special circumstances exist, and the insurer would be entitled to make such an equitable defense in every case, **where suit was brought upon a policy. While the exact question was not discussed in the Bailey or Cable cases, or in the cases which have followed those decisions, it must be presumed that the courts were aware of the essential elements of the suits for rescission or cancellation of instruments as contrasted with the elements of a defense at law.** While recognizing the force of the reasoning in the Marotta case, on the authority of the decisions in the Bailey and Cable cases and the cases which have cited and followed them, we are constrained to hold that it was not erroneous for the trial court to refuse a trial of the alleged equitable issues, because of the nature of the proofs required of the defendant in making a defense in the law action, and there being neither allegation or proof that the policies were issued as the result of mistake. The policies in suit by their terms were incontestable after two years from the date of issue, except for non-payment of premiums, and except as to provisions for disability and double indemnity benefits. This action was begun, and the defendant's answer and cross bill were filed before the two year period had expired. The defendant having thus instituted a contest of the policy within the time limited, was not entitled to the equitable relief asked because of the possibility that the plaintiff might dismiss her action and begin a new one on the policies after the

two year period had expired. New York Life Ins. Co. v. Hurt, 35 Fed. (2d) 92, 96; Powell v. Mutual Life Ins. Co., 313 Ill. 161, 170, 144 N. E. 825.

Complaint is made that the court should have sustained the defendant's motion for a directed verdict. The court submitted the case to the jury with instructions to find for the defendant company unless the jury found that the copies of the applications attached to the policies were legible copies, such that a person with undefective eyes and normal vision could read with a fair degree of certainty. Section 8772 of the Code of Iowa (1931) in force at the time this insurance was written required that a company issuing a life insurance policy should attach or endorse thereon a true copy of any application or representation of the assured, which by the terms of the policy were made a part of it, or of the contract of insurance, or referred to therein, or which might in any manner affect the validity of the policy, and Section 8773 of the Code provided that if any insurance company neglected to comply with the requirements of the preceding section, it should be precluded from pleading, alleging or proving such application or representations or any part thereof, or the falsity thereof, or any part thereof in any action upon such policy.

Appellant claims that a verdict for the defendant should have been directed because it was undisputed that a true copy of the original application was attached to the policies delivered to the assured, and that it could be read by a person with undefective eyes and normal vision.

The record shows that the original application made by the assured was identified and offered and received in evidence. This exhibit is not preserved in the record on this appeal. The original policies delivered to the assured, with the copies of the applications attached are presented by the record. We are precluded by this condition of the record from a comparison, available to the court below, of the contents of the original application with the contents of the alleged copies delivered to the assured. The parts of the original policies, alleged to be

copies of the original application appear to be photographic reproductions of an application signed by the assured. The questions, and some other portions of it are in printed form, while the answers, and the purported signature of the assured and of the medical officer are in handwriting. **A large part of the answers can barely be read by means of a strong magnifying glass owing to the small size and dimness of the letters.** The missing exhibit, the original application, may have demonstrated that it was printed and written on sheets of larger size, and with larger printed and written words, legible to any ordinary reader. **It is obvious, from a casual inspection of the policies, that a large portion of the papers attached as copies of the application, were not capable of being read by persons of normal vision, without the aid of some magnifying instrument.** As to the further claim that the statute is obeyed, if the copy of the original application attached to a policy and delivered to the assured is a true copy of its contents, regardless of its legibility, this would not be the test, if the original is plainly printed and written, in letters of fair size and easily legible, while the copy furnished is so reduced in size, or so dim or blurred that it can be read by persons of normal vision only by the use of strong magnifying glasses. Fidelity Mut. Ins. Co. v. Preuser, 195 Ky. 271, 274, 242 S. W. 608; Arter v. Northwestern Mut. Life Ins. Co., 130 Fed. 768, 769. There was no error in overruling the defendant's motion for an instructed verdict.

Other errors assigned challenge that part of the instructions of the court by which he told the jury that a true copy of the original application, must be a legible copy, such as a person with undefective eyes and normal vision could discern the writing upon and could read with a fair degree of certainty. The only ground of exception taken to this portion of the instructions was that the test of compliance with the statute was not whether the copy could be read, but whether it was a true copy, and that the portion of the charge defining the person who would be the judge of the ability to read the true copy was

immaterial. In Eastman v. Metropolitan Life Ins. Co., 228 Mich. 125, 129, 199 N. W. 655, the court said in discussing a similar statute:

> "The test which the court laid down by which the jury was to determine whether the copy was legible was 'whether it may be read by a person of normal eyesight under normal conditions and with reasonable ease.' We think this was a proper test and, undoubtedly, one which was contemplated by the Legislature when the act was passed. It would be idle for the Legislature to prescribe a notice to be posted that could not be read by the normal eye under normal conditions. In the present case the provision that a copy of the application should be attached to the policy was inserted for a purpose, and that purpose was to enable the insured to know at all times just what representations he had made to obtain the insurance (New York Life Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510), and thereby lessen the controversies which were continually arising after the death of the insured over claimed fraudulent representations made by him to obtain the insurance."

In Jununas v. Metropolitan Life Ins. Co., 239 Mich. 150, 153, 214 N. W. 117, it was said in a similar case:

> "Whether the reduced size photographic copy of the application attached to the policy serves the purpose of the statute involves the question of whether it can be read by a normal eye, under normal conditions, with reasonable ease. If it cannot be read by a normal eye, under normal conditions, with reasonable ease, then to hold it a compliance would render the statute meaningless."

We think these cases express the true rule applicable in this case, and that there appears to be no error in the giving of the instruction of whether the appellant may complain. These are all of the errors assigned that present any substantial question for review, and therefore the judgment will be affirmed.

(Bold face type ours.)

Filed October 25, 1934.

FILE COPY

DEC 3 19

CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS, *Petitioner,*

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S REPLY BRIEF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CHARLES H. SACHS,
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PETITIONER'S REPLY BRIEF.

It is curious that respondent reverts to a position taken by it in Enelow vs. New York Life Insurance Company (No. 47, October Term, 1934, heard by this Court on November 7th, 1934), but abandoned and not urged by it in its brief in opposition to the petition for certiorari. The contention we refer to is that it has no adequate remedy at law by pleading its defense in the lawsuit because the estate of the insured "has an interest in the insurance now in litigation." Evidently it did not advance this point in its brief in opposition to the petition for certiorari because it realized the absurdity of claiming that it must be allowed to proceed in equity because there alone it can get full relief against other outstanding interests, when it made no such claim in its affidavit of defense, or in its petition for a hearing in equity, and actually went through the trial before the chancellor without bringing in anybody else as a party. But the pressure of its necessities forced it to bring it up in its final brief, notwithstanding its first decision not to mention it.

It says on this point: "The fact that respondent mistakenly tendered the premiums to the plaintiff when we had not yet learned as much about this controversy as we now know should not, we respectfully submit, change the rules of law." It is vague about what it "had not yet learned." What *facts* did this insurance company not learn until after the case was tried before the chancellor? It insinuates, without expressly saying so, that it did not know the legal (?) proposition that the estate of Adamos had an interest in the insurance in litigation and they plead, therefore, that they should not be penalized for this claimed ignorance of

the law. They were not ignorant of such a simple proposition of insurance law. They know that the estate of Adamos does not have any interest "in the insurance now in litigation." The only one having any interest in the *insurance* is the beneficiary. It is a mere sham to contend that both the beneficiary and the insured's executors have an interest in this policy. The "insurance" is payable to the beneficiary, if the policy is valid. It is payable to nobody, if it is invalid. And as regard the premiums, it is a humiliating confession for an insurance company to make that, until the year 1934, they did not know that the estate of an insured was interested in the policy or the insurance in litigation. For probably over a hundred years insurance companies have been tendering refunds of premiums to the beneficiaries, in cases where they contested suits on policies on the ground that they were obtained by false answers. They evidently were never hurt by that procedure, or we would not find them, in the year 1934, continuing that time-honored practice. They have not pointed to a single case where the estate of an insured brought a suit to recover on a policy which was payable to a beneficiary who had brought suit on it and was defeated by a defense such as is here involved. It is plain that it is not the fact that anyone else has an interest in the policy besides the beneficiary but their necessities to find some pretext for claiming they need equitable relief, that is responsible for this belated and untenable position. It is, obviously, not presented in good faith, in view of the present state of the record which shows that respondent *entered judgment to petitioner* for the amount of the printing. (R. A. T.)

Our brief, on page 7, refers to the very late case of Harnischfeger Sales Corporation vs. National Life Ins.

Co., 72 F. (2d) 921, (C. C. A. 7). The matter contained in our brief above the citation of the case is the principle stated in the first syllabus. Through an error the matter is enclosed in quotation marks. In that case, a bill in equity was filed *prior* to the lawsuit. Although this case was decided since sec. 274(b) of the Judicial Code was put on the statute books, it affirms the principle that a court of equity should not order cancellation of an insurance policy procured by fraud where the facts indicate that the fraud could be used as a defense to an action at law on the policy, and cites the cases of Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, Cable vs. U. S. Life Ins. Co., 191 U. S. 288; Boyce's Extrs. vs. Grundy, 3 Pet. 210; and Sec. 724 of the Revised Statutes (28 USCA sec. 384).

Respondent's other reason for claiming that it has no adequate remedy at law is the alleged difference in the degree of proof required to establish fraud in a court of law and in a court of equity. The unsoundness of this contention has been pointed out by us in our brief. We do wish to call attention, however, to several statements which respondent makes in trying to build up its argument. It says (p. 21): "At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element." Such a statement is strange, to say the least. If A makes a false representation on a material matter in making a sale to B, or procuring a contract from B, can there be any doubt that B could successfully defend a lawsuit brought by A to recover on the sale or on the contract? Later on in its brief we find what is

probably respondent's reason for making such an extraordinary statement, and it is this, that the Uniform Sales Act (adopted in Pennsylvania in 1915, P. L. 543) Sec. 12, provides that "any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon." That a statute terms a statement of that character a warranty does not detract from the fact that in common as well as legal parlance such a statement is also known as a representation. And for breach of it, relief may be obtained in a court of law as well as in a court of equity.

"How a *judge* may sit as a chancellor at a jury trial in the Pennsylvania state courts is shown by Hile's Estate, 310 Pa. 541, 545, and the cases there cited," says respondent (15). Presumably this is an answer to what we said in our brief, page 13, when we were discussing the opinion of the Circuit Court in the case of Enelow vs. New York Life Insurance Co., *supra*. We were there calling attention to the strange remark of the court that if this case had been permitted to remain in the Pennsylvania court, it would be tried by the trial court with the assistance of a jury "as if the Court *and* Jury were sitting as a Chancellor" (Italics ours). Respondent has not pointed to any case in Pennsylvania where a court *and* jury sat as a chancellor. The Hile case, *supra*, was a case involving an issue *devisavit vel non* in which, under the Pennsylvania Orphans Court Act of 1917 (P. L. 363), the judge,—not the judge and jury,—sits as a chancellor.

In our brief we pointed to the facts that by the terms of respondent's own contract it was bound to prove

knowledge, by the assured, of the falsity of the answers, and that respondent realized its burden and pleaded such knowledge in the affidavit of defense. In its brief (19), it attempts to answer us by saying that we overlook the fact that the affidavit of defense had to cover the respondent's defense at law as well as in equity and that as stated by the court in the Marotta case, *supra*, the defense was both legal and equitable. As regards the latter point, we do not intend to reargue that because that really involves the whole case, and if this Court was correct in the Bailey and Cable cases, *supra*, the Circuit Court was wrong in the Marotta case in saying that the defense was equitable. However, what respondent has to say on the point seems to amount to this that when they are in a court of law litigating with the petitioner, they have to make one defense and when they are in a Court of Equity they have to make another defense. It would seem as though the facts are not the important things, but the technicalities are.

The case of the respondent seems to have developed in this fashion: Suit was brought against it in a court of law, by the beneficiary, on the policy. It filed an affidavit of defense setting up what it, under the provisions of its own contract, must set up to succeed, viz: that the assured knowingly and fraudulently made false answers to the application. It then endeavors to misuse the statute (sec. 274(b) of the Judicial Code) to deprive the plaintiff of the right to a trial by jury, and bases its attempt on the claim that fraud is an equitable defense, and, of itself, gives equity jurisdiction. The Bailey, Cable and many other cases are then called to its attention. Finding that its claim that fraud is an equitable defense is disproved by the

above cases, it says it has another ground for claiming that it has no adequate remedy at law, namely, that in equity it can get along and succeed if it proves only the falsity of the answers without proving the applicant's knowledge of the falsity. Shown its own affidavit of defense, in which it charges that the assured had knowledge of the falsity of the answers, it says that it made that charge because it had to under the rules governing pleadings in actions at law. But that has already been shown to be incorrect. Its peculiarly worded contract put upon it the duty of proving that incorrect answers were knowingly made, or it is senseless.

Respectfully submitted,

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 452

GEORGE A. ADAMOS, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1934.

NO. 452

GEORGE A. ADAMOS, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court reported in 5 F. Supp. 1010, which is the only opinion given in the petitioner's brief, is the opinion upon the petitioner's application for a rehearing of the case on its merits. The original opinion of the District Court is reported in 5 F. Supp. 278. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

STATEMENT OF THE CASE.

A full hearing of this case on its merits has been had (R. 35-242). All the evidence which either party had to offer was received. No objection to the hearing was made by the petitioner at the opening of the trial (R. 35-36), nor at the close of the respondent's evidence (R. 147-148), nor at the conclusion of all the evidence (R. 205). The learned judge who heard the evidence was of the opinion that "This is a very plain case of fraud upon the insurance company" (R. 233). In the opinion upon the petition for rehearing, the District Court further says (R. 242):

> "To our mind, the proofs in this case disclosed a deliberate concealment by plaintiff of his physical condition and medical history, in order to induce the issuance of the insurance policies."

Undisputed testimony from nine disinterested physicians proved that the deceased was suffering from a far advanced cancer of his abdominal organs for several months before applying for the insurance in litigation (R. 59-107). Less than two months before applying for the insurance, the deceased was in one hospital for said disease (R. 84-85) and between delivery of the second and third policies he was treated in another hospital for his cancer (R. 61). Within three months after the issuance of the policies death occurred, the cause being the aforesaid cancer (R. 226).

When applying for the insurance, Adamos denied and concealed that he had had any illness, that he had consulted or been examined or treated by any physician or that he had been under observation or treatment in any hospital (R. 48-49).

The third and fourth policies were not delivered until the latter part of May or the first part of June, 1932 (R. 117-118, 125). The medical examination on which the policies are based was made on April 6, 1932 (R. 48). Between April 6th and the latter part of May, Adamos was confined in a hospital (R. 61) and after leaving there continued to return for some time for treatments (R. 106) and was attended by four different physicians (R. 60, 100, 102-103, 106). No disclosure whatever of this intervening medical history was made to the company when these policies were delivered to Adamos (R. 127).

Each policy contains a provision that the insurance "shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination" (R. 219). Between the medical examination for and the delivery of the last two policies, Adamos consulted or was treated by at least four doctors (R. 60, 100, 102-103, 106). There is also some evidence to the effect that Adamos had medical treatment between the medical examination for and the delivery of the two policies first issued (R. 48, 122, 226).

ARGUMENT.

Summary.

I.

THE CASE WOULD NEVER REACH THE JURY.

II.

THE PROCEDURE BELOW WAS CORRECT.

I.

THE CASE WOULD NEVER REACH THE JURY.

The proof of the fraud by which the insurance in litigation was procured is so clear and overwhelming that even if the case were tried at law before a jury, the trial judge would be duty-bound to direct a verdict for the defendant and thus take the case away from the jury. Where the evidence preponderates so heavily in favor of one side that the trial judge would feel bound to set aside a verdict for the other side as being against the manifest weight of the evidence, it is not only his right but his duty to direct a verdict for the party in whose favor the evidence so preponderates: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333. Cases in which that principle has been applied to a state of evidence analogous to but not stronger than that in the case at bar are legion in number and include the following: *New York Life Insurance Co. v. Price,* 16 F. (2d) 660; *New York Life Insurance Co. v. McCarthy,* 22 F. (2d) 241; *Tutewiler v. Guardian Life Insurance Co.,* 42 F. (2d) 208; *Fountain & Herrington v. Mutual Life Insurance Co.,* 55 F. (2d) 120; *Self v. New York Life Insurance Co.,* 56 F. (2d) 364; *Aetna Life Insurance Co. v.*

Bolding, 57 F. (2d) 626; *DeRoy v. New York Life Insurance Co.*, 61 F. (2d) 317; *Aetna Life Insurance Co. v. Perron*, 69 F. (2d) 401; *New York Life Insurance Co. v. Stewart*, 69 F. (2d) 957; *Dudgeon v. Mutual Benefit Ass'n*, 70 F. (2d) 49; *Jefferson Standard Life Insurance Co. v. Stevenson*, 70 F. (2d) 72; *Lyttle v. Pacific Mutual Life Insurance Co.*, 72 F. (2d) 140. In each of those cases it was held that the case should be taken from the jury and a verdict directed for the insurance company.

The two policies last issued, and perhaps the first two also, are also vitiated because of the nondisclosure of pertinent information when they were delivered. In *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, this Court held that an applicant for insurance must inform the insurer when delivery of a policy is tendered to him of any pertinent facts bearing on his health which have occurred between the date of his medical examination and delivery of the policy. Adamos, on account of his cancer, had been confined and treated in a hospital and had been attended by at least four doctors between the medical examination for and delivery of the last two policies (R. 60-61, 100, 102-103, 106). None of these facts was disclosed by Adamos when the policies were delivered to him (R. 127).

The last two policies, and perhaps the first two also, are void for the additional reason that the condition precedent to their going into effect was broken. The express provision in the policies that they should not take effect if the applicant consulted or was treated by any physician between the date of his medical examination and the delivery of the policy was unquestionably violated. Such a provision constitutes a condition precedent which is valid and will be enforced: *Bostick v.*

New York Life Insurance Co., 284 Fed. 256; *MacKelvie v. Mutual Benefit Life Insurance Co.*, 287 Fed. 660; *New York Life Insurance Co. v. Horton*, 9 F. (2d) 320; *Aetna Life Insurance Co. v. Johnson*, 13 F. (2d) 824; *Mutual Life Insurance Co. v. Tabb*, 49 F. (2d) 1019; *Subar v. New York Life Insurance Co.*, 60 F. (2d) 239; *Gill v. Mutual Life Insurance Co.*, 63 F. (2d) 967.

Since, therefore, the petitioner's case would not reach the jury even if tried before one, the petitioner has not been deprived of a trial by jury and has suffered no prejudicial harm.

This case differs from that of *Enelow v. New York Life Insurance Co.*, No. 1065 October Term, 1933, in this Court, in that this case has been fully heard on its merits, and from the proofs it is clear that, even if the case were tried before a jury, the trial judge would be compelled to direct the verdict and thus decide the case himself.

II.

THE PROCEDURE BELOW WAS CORRECT.

The decisions below with respect to the procedure followed in this case are supported by the following precedents: *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 241, 242-243; *Phillips-Morefield v. Southern States Life Insurance Co.*, 66 F. (2d) 29, 30 (C. C. A. 5); *New York Life Insurance Co. v. Marotta*, 57 F. (2d) 1038 (C. C. A. 3); *New York Life Insurance Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8), 41 F. (2d) 392; 51 F. (2d) 936 (C. C. A. 10), certiorari denied, 285 U. S. 541; *Peake v. Lincoln National Life Insurance Co.*, 15 F. (2d) 303, 305 (C. C. A. 8); *Union Pacific R. Co. v. Syas*, 246 Fed. 561, 566 (C. C. A. 8).

The petition for certiorari indicates that the Fifth Circuit is in conflict with the Third Circuit. A decision by the Circuit Court of Appeals for the Fifth Circuit on all fours with the case at bar is in accord with the decisions below: *Phillips-Morefield v. Southern States Life Insurance Co.*, 66 F. (2d) 29, 30. That case contains a clear exposition of the reasons why the petitioner has not been deprived unlawfully of a jury trial.

Phoenix Mutual Life Insurance Co. v. Bailey, 13 Wall. 616; *Cable v. United States Life Insurance Co.*, 191 U. S. 288; *Buzard v. Houston*, 119 U. S. 347; and *Hipp v. Babin*, 19 How. 271, cited by the petitioner, were all decided before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. None of those cases has anything to do with the manner in which an equitable issue introduced into an action at law under Section 274(b) of the Judicial Code should be disposed of. Those were all cases involving separate suits in equity. *Schoenthal v. Irving Trust Co.*, 287 U. S. 92, also involved a separate suit in equity. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is beside the question here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated. The answer to the question presented is contained in the cases first cited under this point in this brief.

The defense that the contract sued upon was induced by fraud is an equitable defense. The group of cases first cited under this point in this brief is authority also for that conclusion. To those might be added *Fay v. Hill*, 249 Fed. 415, 418 (C. C. A. 8). Fraud is

one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief: *2 Pomeroy's Equity Jurisprudence* (4 Ed.) § 885; *Smith v. Richards,* 13 Pet. 26, 36; *Turner v. Ward,* 154 U. S. 618; *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2); *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2); *New York Life Insurance Co. v. Marotta,* 57 F. (2d) 1038 (C. C. A. 3); *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4); *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6); *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6); *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7); *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8). Sooner or later, therefore, the respondent would have the right to have its defense of fraud adjudicated according to the equitable rule for determining whether a contract has been procured by fraud. Efficiency, economy and enlightened practice, as well as all other sound considerations, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank et al., supra,*

260 U. S. 235, 242. The inadequacy of the remedy at law need not be specifically averred in the defendant's pleadings, inasmuch as it follows from the application of the relevant legal principles to the facts of the case and is therefore a conclusion which the courts perceive.

The remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction: *Boyce v. Grundy*, 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

That the constitutional guaranty of trial by jury does not apply to equity procedure is well established: *Parsons v. Bedford et al.*, 3 Pet. 433, 446; *Barton v. Barbour*, 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

Furthermore, a full hearing of this case on its merits has been had, without any objection whatever thereto having been raised by the petitioner at any time during the hearing. By so doing it is submitted that the question of jurisdiction and procedure has become immaterial.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

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DEC 1 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 452

GEORGE A. ADAMOS, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 452

GEORGE A. ADAMOS, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Opinions Below.

The original opinion of the District Court is reported in 5 F. Supp. 278. The opinion of the District Court on the petitioner's application for a rehearing of the case on its merits is reported in 5 F. Supp. 1019. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

Statement of the Case.

The petitioner's statement of the case avoids any reference to the facts or merits of the controversy. Consideration of the second major point in our argument necessitates a knowledge of the facts.

In brief, the situation presented is that of a 54-year-old Greek allegedly totally disabled laborer obtaining $20,000 worth of insurance in a mutual life insurance company when he had far advanced cancer of his abdominal organs, which he concealed and from which he died within three months of the issuance of the policies (R. 228-232).

There are four policies involved, each for $5,000. Policies No. 11,773,180 and No. 11,773,181 are dated and were written on April 8, 1932 (R. 228, 254). Policies No. 11,780,717 and No. 11,780,718 are dated and were written on April 19, 1932 (R. 228, 254). The petitioner incorrectly states that each of the four policies is dated April 8, 1932. The first two policies were delivered to Andy Adamos and the first premiums thereon paid by him on April 15, 1932 (R. 122, 228). The last two policies were delivered to the deceased and the first premiums thereon paid by him during the latter part of May or the first part of June, 1932 (R. 125-126, 228).

The medical examination for all four policies was made on April 6, 1932 (R. 48). As a part of that examination, Andy Adamos, the deceased, was asked the following questions and answered them as set opposite each, respectively (R. 48-49, 229-230):

"7. A. Have you ever had any accident or injury or undergone any surgical operation? No

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? No

F. Have you gained or lost in weight in the last year? No

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

C. The Stomach or Intestines, Liver, Kidneys or Bladder? No

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None."

Adamos signed the application after the answers to the questions had been inserted (R. 47-48, 59, 228). The examining physician testified that a man might have cancer of his internal abdominal organs without his discovering that, in the absence of a truthful history (R. 55).

Each policy contains a provision that the insurance "shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination" (R. 219).

Chronologically, Adamos's medical history is as follows: On March 14, 1926, he fell while working for the Jones & Laughlin Steel Corporation and fractured certain of his lumbar vertebrae, the base of his skull, both of his femurs and his left tibia. On account of said injuries, he underwent a surgical operation in a hospital where he was confined from March 14, 1926, until July 8, 1926 (R. 41-42). From the time of said accident until his death, Adamos collected workmen's compensation from the Jones & Laughlin Steel Corporation as for total disability (R. 108-112).

In 1930 or 1931, Adamos was treated six or seven times or more by Dr. Spanos, a fellow countryman, for hypertrophy of the prostate gland (R. 79). These treatments consisted of massage of the prostate gland through the rectum (R. 81). In a letter written by Dr. Spanos on his own stationery and signed by him on February 14, 1933, he stated that these treatments for the enlargement of the prostate gland were during the year 1931 (R. 82-83 and Exhibit "G").

In November, 1931, Dr. Belinky was summoned to Adamos's residence to attend him, found him in bed suffering much pain in his back and abdomen, and prescribed a powerful sedative for him (R. 71-72).

On December 11, 1931, Dr. Owens testified, he was called to Adamos's home, that Adamos was in bed, that he complained of pains throughout his abdomen and that a sedative was prescribed (R. 73-74).

On December 28, 1931, Dr. Owens again was called to where Adamos was living and found him in bed, still in pain and weaker (R. 74-75).

In February, 1932, Adamos again consulted Dr. Spanos. At that time Adamos was complaining of pain in his lower abdomen and said that some doctors had told him that his appendix was diseased and others that he had gallstones "or something like that" (R. 78-79).

On February 9, 1932, Adamos, at the direction of Dr. Spanos, entered the St. Francis Hospital in Pittsburgh (R. 85). An eminent physician who examined Adamos there readily diagnosed Adamos's ailment as a "very advanced" "inoperable carcinoma involving the prostate gland and the surrounding structures" (R. 86-87). This doctor wrote a prescription for Adamos which had plainly written upon it "inoperable carcinoma" (R. 88 and Exhibit "H"). According to this doctor, Adamos was sick enough to have conveyed to the mind of any ordinary person that he was seriously ill (R. 89-90).

While in the St. Francis Hospital, Adamos was also examined by a specialist in genito-urinary diseases, who confirmed the diagnosis of cancer, described it as "far advanced," thought that nothing could be done for Adamos except to alleviate his pain, and predicted that Adamos had only six months to live (R. 95-97).

On February 23, 1932, Dr. Owens was again called to where Adamos was living, found him in bed, in pain and weaker, and made a diagnosis of carcinoma of the rectum or lower bowel (R. 75-76).

On April 18, 1932, Dr. Hadley was summoned to where Adamos was then staying. He found Adamos in bed, suffering very marked pain and groaning, diagnosed the case as one of cancer and prescribed a narcotic to relieve the pain (R. 100).

On April 21, 1932, Adamos entered the West Penn Hospital in Pittsburgh and remained there until April 29 (R. 61). While in that hospital Adamos was examined by at least three doctors (R. 60, 102-103, 106). Adamos told one of these doctors that he had lost fifteen pounds in weight in the four preceding months (R. 61). At this hospital a cystoscopic examination, which consists of the insertion of an instrument into the bladder and is a very uncomfortable procedure, was made (R. 62). The doctors at the West Penn Hospital were of the opinion, in the words of one of them, that Adamos had "inoperable carcinoma of the prostate gland, involving the bladder, with probable extension into the lung" (R. 62, 103). After leaving this hospital, Adamos returned there for deep x-ray and therapeutic treatments until May 11 (R. 106).

On July 6, 1932, Adamos died (Exhibit "T"). According to the official death certificate, death was caused by "carcinoma of sigmoid" of eight months' duration (Exhibit "T," R. 226). The sigmoid is part of the intestines. In the official death certificate, Dr. Owens

stated that he had "attended deceased from March 15, 1932, to July 5, 1932" (Exhibit "T," R. 226).

When the last two policies were delivered to Adamos in the latter part of May or the first part of June, 1932, he did not disclose to the respondent that he had had any ill health or that he had consulted any physicians or that he had been examined or treated in any hospital (R. 127).

It is unquestioned that Adamos could speak and understand considerable English. He migrated to this country when between 15 and 20 years of age (R. 162). According to the age he gave in the application, he was 54 years old in April, 1932 (R. 211, 218). He was therefore in this country for at least 34 years except for his visits to the old country. The last time he came to America was in 1913, so that he was continuously in this country for approximately 19 years before his death (R. 162). All of his negotiations with the agent were in English (R. 133). His conversation with most of the doctors was also in English (R. 98-99, 105). There was evidence that Adamos could speak and understand English as well as or better than any of the Greeks who testified at the hearing, for none of whom an interpreter was used (R. 205). Adamos knew that he had been in the St. Francis Hospital, for he so told his partner (R. [illegible])

The learned Judge who heard the evidence was convinced that the insurance in litigation was procured by a deliberate fraud (R. 233, 242).

ARGUMENT.

Summary.

I.

The procedure below was correct.

1. **The procedure below is supported by the weight of authority.**
2. **There is no adequate remedy at law.**
3. **Sound policy supports the decisions below.**
4. **Section 274(b) of the Judicial Code is constitutional.**

II.

There is no jury question.

I.

The Procedure Below Was Correct.

The question about to be considered is whether under the provisions of Section 274(b) of the Judicial Code the defense of fraud to an action upon an insurance policy may be disposed of according to equitable principles and practice before a judge sitting as a chancellor in advance of the trial by jury of the legal issues, if any, remaining in the case. In the broadest analysis this question resolves itself into two others: one is how that statutory provision should be construed and the other is whether that enactment as construed by the lower courts is constitutional. These two questions will be considered in the order in which they have just been stated.

The construction of Section 274(b) of the Judicial Code adopted by the lower courts in the instant case is

the proper one and should be upheld, we respectfully submit, for the following reasons: (1) it is supported by the weight of authority; (2) it is required by the relevant legal principles; (3) it is needed for the improvement of the administration of justice in civil cases.

The Procedure Below Is Supported by the Weight of Authority.

To the best of our knowledge, there are five cases which involved facts substantially the same as in the case at bar and in which the question now before this Court was decided. They are *New York Life Ins. Co. v. Marotta,* 57 F. (2d) 1038 (C. C. A. 3); *State Life Ins. Co. v. Spencer,* 62 F. (2d) 640 (C. C. A. 5), certiorari denied, 289 U. S. 746; *Phillips-Morefield v. Southern States Life Ins. Co.,* 66 F. (2d) 29 (C. C. A. 5); *Enelow v. New York Life Ins. Co.,* 70 F. (2d) 728 (C. C. A. 3), now pending in this Court at No. 47 October Term, 1934; and *New York Life Ins. Co. v. Miller* (C. C. A. 8), not yet reported. These precedents stand four to one in favor of the decisions of the courts below in the case at bar. The circuits stand two to one in favor of the courts below in this case. Judges Bryan, Foster, Hutcheson, Sibley, Akerman, Buffington, Woolley, Thomson, Davis, Dickinson, Fake, Schoonmaker and McVicar, a total of thirteen judges, have unanimously agreed that the procedure followed in this case is correct. Were all these judges wrong?

In the petitioner's brief (p. 14), the force of the *Marotta* decision is sought to be impaired by the statement that the appellees' brief in that case "entirely ignored" the question here presented. Point III in the appellees' brief in the *Marotta* case reads as follows:

> "The Court correctly denied the motion of the defendant, that the Court, sitting as a Court of

Equity should make a finding of fact and law and enter a decree against the executors of the estate of Andrea Marotta in accordance with the prayers of its equitable defenses."

That heading is followed by argument. The question under consideration was specifically raised by the record in the *Marotta* case and was the turning point in the outcome because it was solely upon the question of hearing the equitable defense that the Circuit Court of Appeals reversed.

In addition to the foregoing cases, others not involving the precise question in which we are interested, but in which the courts, in reasoning toward their decisions, have expressed an opinion upon the question now before this Court, include *Peake v. Lincoln National Life Ins. Co.*, 15 F. (2d) 303, 305 (C. C. A. 8); *New York Life Ins. Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8), 41 F. (2d) 392 (D. C., Kan., 2 Div.), 51 F. (2d) 936 (C. C. A. 10); and *New York Life Ins. Co. v. Halpern*, 47 F. (2d) 935, 938 (D. C., W. D. Pa.). Each of those cases involved life insurance alleged to have been procured by materially false answers in the application. The opinion expressed by the court in each of those cases upon the question in which we are interested is in accord with the decree appealed from. In the *Peake* case, a bill in equity had been filed by the insurer to cancel a policy because of fraud by the insured in his answers to questions in the application. The next day after the filing of this bill the beneficiary brought an action at law in a state court upon the policy. The District Court entertained jurisdiction and granted an injunction against further prosecution of the action at law. The Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that no possible injury could occur to the beneficiary through sustaining the equitable jurisdiction, be-

cause the defense of fraud was an equitable one and would be heard by a chancellor without a jury, even if that defense were interposed to an action at law. Upon this point Judge Lewis said (p. 305):

> "No possible injury or detriment can come to Mrs. Peake by staying her action until the equity suit is first disposed of, which will be tried without a jury, as the equitable defense to her law action also would be tried without a jury. *U. P. R. Co. v. Syas, supra; Liberty Oil Co. v. Condon Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232. She is being denied no right by the order complained of."

In *New York Life Insurance Co. v. Halpern, supra,* Judge Gibson of the District Court for the Western District of Pennsylvania, in holding that equity had jurisdiction of a bill to rescind a life insurance policy under the circumstances of that case, said (p. 938):

> "And even if all testimony were still available, if the directions of the Circuit Court of Appeals in the *Hurt* case, *supra,* should be followed in respect to the manner of trial, the defensive matter set forth in plaintiff's bill would be heard by the judge as a chancellor, and passed upon by him prior to submission of the case to the jury."

The *Hurt* case (35 F. (2d) 92), referred to by Judge Gibson in the preceding quotation, is in accord with the *Phillips-Morefield* case, *supra.* The directions of the Circuit Court of Appeals for the Eighth Circuit, referred to by Judge Gibson, were followed by Judge Pollock of the District Court for the District of Kansas, Second Division, when the *Hurt* case was remanded back to him: 41 F. (2d) 392. After a hearing before Judge Pollock, sitting without a jury, he entered a decree cancelling the policy there involved on the ground that it had been procured through fraudulent conceal-

ment by the insured of his physical condition and consultations with physicians, as well as of breach of a condition precedent by reason of the insured having consulted a physician between the date of his medical examination for the policy and the date of the delivery of the policy to him. This decree was affirmed upon a second appeal to the Circuit Court of Appeals (51 F. (2d) 936).

The petitioner attempts to distinguish the *Hurt* case on the ground that someone else besides the plaintiff in the lawsuit had an interest in the policy. That other party was the administratrix of the insured's estate. The estate of Andy Adamos, however, has an interest in the insurance now in litigation, because the premiums which Andy Adamos paid would be strictly returnable to his estate and not to the beneficiary designated for the death benefit. The fact that the respondent mistakenly tendered the premiums to the plaintiff when we had not yet learned as much about this controversy as we now know should not, we respectfully submit, change the rules of law. The premiums were paid by Andy Adamos (R. 122, 125-126). Certainly the petitioner did not pay the premiums because he testified that he did not even know that the insurance had been taken out until after his father's death (R. 149). It is clear, therefore, that the estate of Andy Adamos would be entitled to the refund of the premiums and not the petitioner.

There are also many other cases construing Section 274(b) of the Judicial Code. The leading case is *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235. While not involving life insurance, it is submitted that that case and the lower court cases which have followed it support the decisions below in the instant case in principle. Since the petitioner now relies heavily upon

New York Life Ins. Co. v. Miller from the Eighth Circuit, two other cases from that circuit (not, however, involving life insurance but holding that the defense of fraud in the procurement of a contract is an equitable defense which when introduced under Section 274(b) of the Judicial Code into an action at law, should be disposed of first by a judge without a jury) may be noted. They are *Union Pacific R. R. Co. v. Syas,* 246 Fed. 561, 566, and *Fay v. Hill,* 249 Fed. 415. In the latter case the Circuit Court of Appeals for the Eighth Circuit said (p. 418):

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury. This was decided by this court in *Union Pacific R. R. Co. v. Syas,* 246 Fed. 561,—C. C. A.—The facts alleged in the complaint make it clearly a case for equitable relief, as it seeks to cancel contracts alleged to have been obtained by fraud and deception, and that the minds of the parties had never met. *Sharon v. Hill* (C. C.), 20 Fed. 1; *Sharon v. Hill* (C. C.), 22 Fed. 28. The cancellation of the contracts would prevent their use in any other action instituted by appellant on these contracts."

American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., 62 F. (2d) 1018, cited by the petitioner, did not involve rescission of a written contract which had been procured by fraud, but only other questions fully cognizable at law, as shown by the two jury trials through which the case had already gone. That was an action at law to recover alleged overcharges in the sale of phos-

phate and the real question in the case was whether the defendant had assumed the obligations of one of the original parties to the contract. There was no difference between the applicable principles at law and in equity in that case. Furthermore, all of the parties who could possibly have any interest in the subject matter were joined in that case, which is not so in the instant case.

Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, cited by the petitioner, was expressly distinguished by the Circuit Court of Appeals for the Fifth Circuit in *Phillips-Morefield v. Southern States Life Ins. Co., supra.* That distinction is that the *Bailey* case, as well as *Cable v. United States Life Ins. Co.,* 191 U. S. 288, was decided long before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. By this, of course, we do not mean that the defense of breach of warranty in a sale could not have been heard at law in a Federal court prior to the adoption of Section 274(b) of the Judicial Code, which is what the query in the petitioner's brief (p. 19) amounts to. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law (28 U. S. C. A. § 384), that is a different question from the one here presented, which is how an equitable defense specifically authorized by a new provision of equal force added to the Judicial Code shall be disposed of. The situation is now different from what it was when the *Bailey* and *Cable* cases were decided in that in the meantime Congress has added Section 274(b) to the Judicial Code, thereby providing the salutary improvement of introducing equitable issues into actions at law. Equitable issues when so introduced should be heard and decided according to equitable principles and practice. The equitable

principle for determining whether such fraud exists as will vitiate a contract differs from the rule at law for actionable fraud in that knowledge of the incorrectness of his statements by the declarant is not necessary in equity in order to have the contract induced by such erroneous declarations cancelled and rescinded. Equitable procedure differs from that at law in that trial by jury is not required. Authority for these assertions will be set forth hereinafter.

It may also be noted that the *Bailey* and *Cable* cases involved insurance policies which contained no incontestable clauses.

Buzard v. Houston, 119 U. S. 347, and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were decided before Section 274(b) was added to the Judicial Code. *Central Florida Lumber Co. v. Taylor-Moore Syndicate,* 51 F. (2d) 1, cited by the petitioner, is not in point. That was a suit to recover money which had been paid for an option. Since only a money judgment was desired and no cancellation of a written instrument was needed, it was correctly determined that the case should be transferred to the law side of the court. *Harnischfeger Sales Corp. v. National Life Ins. Co.,* 72 F. (2d) 921, does not contain the quotation indicated on page 7 of the petitioner's brief. The court in that case expressly held that equity had jurisdiction, but that a contemporaneous suit in a state court could not be stayed pending the outcome of the equity suit in the Federal Court. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, involved a separate suit in equity. In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, also cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense.

There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

How a judge may sit as a chancellor at a jury trial in the Pennsylvania state courts is shown by *Hile's Estate,* 310 Pa. 541, 545, and the cases there cited.

From the foregoing review of the precedents, it is respectfully submitted that the weight of them sustains the decisions of the lower courts in the case at bar and that the decisions in accord with the instant case are sound and should be followed.

There Is No Adequate Remedy at Law.

We pass now to the second reason for ratifying the construction of Section 274 (b) of the Judicial Code adopted by the courts below. That reason is that this construction is required by sound legal reasoning. There are two pertinent principles which demonstrate this. One is that equity has jurisdiction where there is no plain, adequate and complete remedy at law, and the other is that equity has jurisdiction where all of the parties necessary to a complete disposition of the controversy are not and cannot be joined at law.

One reason why there is no adequate remedy at law is that a written contract will be rescinded and ordered surrendered by equity if the complaining party was induced to enter into it by materially false representations of fact by the other party, though the latter did not know that his representations were false when he made them. At law actionable fraud requires, in addition to the falsity and materiality of the representa-

tions, proof that the assertions were made with knowledge of their falsity or in reckless disregard of the truth. In equity, on the contrary, no such proof is necessary. Equity will grant relief by way of rescission of a written contract upon proof only that one of the parties asserted what was not correct in fact and that the other party would not have entered into the contract but for those erroneous statements. *1 Black on Rescission and Cancellation* (2 Ed.), §102. *1 Story's Equity Jurisprudence* (14 Ed.), § 272. *2 Pomeroy's Equity Jurisprudence* (4 Ed.), § 885. *12 R. C. L.* 345. *26 Corpus Juris* 1181-1182. *Smith v. Richards,* 13 Pet. 26, 36. *Turner v. Ward,* 154 U. S. 618. *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2). *In re New York Commercial Co.,* 228 Fed. 120, 121 (C. C. A. 2). *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2). *New York Life Insurance Co. v. Marotta, supra. Kell v. Trenchard,* 142 Fed. 16, 23 (C. C. A. 4). *Manly v. Ohio Shoe Co.,* 25 F. (2d) 384, 385 (C. C. A. 4). *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4). *Donnell v. C. R Disharoon Co.,* 32 F. (2d) 151, 153 (C. C. A. 4). *General Finance Corp. v. Keystone Credit Corp.,* 50 F. (2d) 872, 878 (C. C. A. 4); certiorari denied, 284 U. S. 684. *Hindman v. First National Bank,* 112 Fed. 931, 944 (C. C. A. 6); certiorari denied, 186 U. S. 483. *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6). *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6). *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7). *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8).

In the first of the authorities just cited, it is said (p. 300):

> "An action at law for fraud in making false representations and a suit in equity for the rescission of

a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the *status quo*, and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth."

In the same work it is also said (p. 301):

"Hence we have the well-settled rule in equity that when rescission of a contract, deed, or other transaction is sought on the ground of misrepresentations of material matters of fact, believed in and acted upon by the party seeking relief, and resulting in his injury or prejudice, it is not necessary to show that the party making the representations knew them to be false, but he will be held responsible for their falsity, though he spoke without knowing anything about the matter, though he himself was misinformed and mistaken, and even though he actually believed in the truth of what he affirmed."

The authorities are well summarized in *12 R. C. L.* 345 as follows:

"Rule in Equity—False representations which are made with knowledge of their falsity, and with a fraudulent intent, are, of course, ground for relief in equity as well as at law. As a general rule, however, courts of equity will grant relief in such cases, by way of rescission or otherwise, even though no frauduent intent on the part of the person making the representation is shown, and though

> he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."

Surely "it operates as a surprise and imposition" (to use the words of this Court in *Smith v. Richards, supra*) upon and misleads a mutual life insurance company if it is informed that an applicant has never been under observation or treatment in any hospital, has not lost weight in the last year and has not consulted or been examined or treated by any physician within the preceding five years, and then, after it has issued $20,000 worth of insurance to that applicant as a first-class risk, he dies within less than three months of cancer, from which he had been suffering for several months at least, for which he had been in one hospital within two months of his application for the insurance and in another hospital between the medical examination for and the delivery of two of the policies and for which he had consulted and been examined and treated by nine different physicians within the immediately preceding six months, to say nothing of his loss of fifteen pounds in weight during the four months preceding issuance of the policies.

There is also a very large number of decisions in accord by the State courts. They include *King v. Livingston Mfg. Co.,* 192 Ala. 269, 272; *Johnson v. Withers,* 9 Cal. A. 52, 55; *Colorado Springs Co. v. Wight,* 44 Colo. 179, 182; *Frenzel v. Miller,* 37 Ind. 1, 18; *Trimble v. Reid,* 97 Ky. 713, 718; *Hammatt v. Emerson,* 27 Me. 308, 332; *Cahill v. Applegarth,* 98 Md. 493, 503-4; *Rimer v. Dugan,* 39 Miss. 477, 483; *Peters v. Lohman,* 171 Mo. A. 465, 483; *Eibel v. Von Fell,* 55 N. J. Eq. 670, 671; *Sarson v.*

Maccia, 90 N. J. Eq. 433, 435; *Kountze v. Kennedy,* 147 N. Y. 124, 129; *Squiers v. Thompson,* 76 N. Y. S. 734, 736, 73 App. Div. 552, affirmed in 172 N. Y. 652; *McCall v. Davis,* 56 Pa. 431, 435; *Shwab v. Walters,* 147 Tenn. 638, 643; *Buchanan v. Burnett,* 102 Tex. 492, 495; *Collins v. Chipman,* 41 Tex. Civ. A. 563, 577; *Wilson v. Carpenter,* 91 Va. 183, 187, 189-190; *Tolley v. Poteet,* 62 W. Va. 231, 251; and *Smith v. Mariner,* 5 Wis. 551, 577.

Southern Development Co. v. Silva, 125 U. S. 247, cited by the petitioner, does not decide differently. The plaintiff in that case failed for want of proof that the defendant had made any false statement or that the plaintiff had relied upon what the defendant said.

Sooner or later the respondent, it is respectfully submitted, should have the right to have its defense of fraud adjudicated according to the equitable criterion enunciated in the foregoing authorities for determining whether the policies were procured by fraud. Efficiency, economy, enlightened practice and all other sound considerations, we submit, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

The petitioner seeks to escape from the inadequacy of the legal remedy shown by the group of authorities last cited because the respondent in its affidavit of defense pleads that Adamos made the answers in the application with knowledge of their falsity and fraudulently for the purpose of procuring the insurance. The petitioner overlooks the fact that the affidavit of defense had to cover the respondent's defense at law, as well as in equity. As stated by the Court in *New York Life Insurance Co. v. Marotta, supra,* the defense was both legal and equitable. At law the group of cases last cited show

that knowledge of the falsity of his statements by the party making them must be pleaded and proved. It was therefore necessary to allege in the affidavit of defense that Adamos knew that his answers were false. The respondent was justified in making those allegations because it believes them to be true. Whether Adamos knew the nature of his afflictions or not, he certainly knew that he had been in a hospital and had consulted and been examined or treated by several physicians during the six months immediately before applying for the insurance in controversy. It could not be foretold, however, whether the respondent would be able to prove such guilty knowledge, and, even if it did so, a sympathetic and prejudiced jury would probably nevertheless find against it. Simply because the affidavit of defense also pleads what is necessary to constitute a defense at law, it does not follow, as the petitioner simply assumes, that those allegations of the affidavit of defense must also be proved in the hearing according to equitable principles and practice.

Also for the purpose of showing that there is an adequate remedy at law, the petitioner refers to the provision of the policy to the effect that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties. That provision, it is submitted, is irrelevant to the issue. Even though the insured's statements be but representations, if they relate to material matters, are false in point of fact, and were an inducement but for which the respondent would not have issued the policies, all of the requisites for relief in equity are present.

It was not necessary for the respondent to plead that it is without an adequate remedy at law or that it is in need of equitable relief. The inadequacy of the

remedy at law and the need for equitable relief follow as conclusions of law from the application of the relevant legal principles to the facts of the case and are thus perceived by the Court for itself.

From what has already been said, it also follows that the defense that the applicant's answers to material questions were false and that the respondent was misled by those incorrect declarations, though the applicant may not have known of the falsity of his answers when he made them, could not be pleaded at law in bar. At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element. The defense, in so far as it is based simply upon the falsity and materiality of the deceased's answers to the questions in the application, is therefore an equitable defense within the petitioner's own definition.

That the defense of fraud in this case is an equitable one is indicated by *Lantry v. Wallace,* 182 U. S. 536, 548-550. See also *Northern Pacific R. R. v. Paine,* 119 U. S. 561.

The illustration involving the jeweler put in the petitioner's brief (p. 22) is not apropos because a representation by such a vendor that a watch case was solid gold, 18 carat fine, would clearly constitute a warranty in the law of sales. The Uniform Sales Act, which was adopted in Pennsylvania in 1915, P. L. 543, and has been adopted by most of the other states also, provides in § 12 that "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is

to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

Lastly, in connection with the distinction between the rules at law and in equity for determining whether such fraud exists as will vitiate a contract, the petitioner refers to the proposition that mere expressions of opinion or representations qualified by a statement that they are simply to the best of the knowledge of the party making them, do not constitute any ground for complaint either at law or in equity. There is no question about the correctness of that proposition in the abstract, but it does not apply to the facts of the case at bar. While a question to an applicant for insurance inquiring whether he has a specified disease, as the petitioner supposes in his brief (p. 23), may simply call for an honest expression of opinion, the defense to the petitioner's claim in the instant case is based in part upon questions about the answers to which there could be no difference of opinion. The questions relied upon for the defense include ones which inquire only for simple facts within the knowledge of the applicant. Thus, one of the questions involved in the case at bar is whether the applicant has ever been under observation in any hospital (R. 48, 229). Another asks what physicians, if any, the applicant has consulted or been examined or treated by within the past five years (R. 49, 230). Adamos had been in a hospital for observation and had consulted at least five doctors within approximately six months before applying for the insurance in dispute (R. 71-72, 73-76, 78-79, 84-87, 95-96, 226). These were simple facts within his knowledge, admitting of no difference of opinion: *New York Life Ins. Co. v. McCarthy,* 22 F. (2d) 241, 244. It does not help the petitioner therefore to advert to the propriety of expressions of opinion. Nor is it conceivable how it

could be material whether the false representations were made in answer to questions or not.

Another reason why the remedy at law is not adequate when the beneficiary brings suit to recover the death benefits, and the defense is that the policy is voidable on account of fraud and should be rescinded, is that all of the necessary parties to a complete disposition of the controversy are not and cannot be made parties to the action at law. The beneficiary designated in the policy is not the only person having an interest in the insurance in such a case—unless the beneficiary had paid the premiums, which is not claimed in the instant case. Here the premiums were paid by Andy Adamos (R. 122, 125-126). The petitioner certainly did not pay the premiums (R. 149). If the insurance was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate and not to the beneficiary designated for the death benefits. There is no method for joining the personal representative of the decedent's estate, or other third party who may be entitled to refund of the premiums, to an action at law brought by the beneficiary of the policy against the insurer. Consequently, the remedy at law is for this reason also inadequate.

That the petitioner in this case is not the only person with an interest in the subject matter of the litigation follows as a matter of law, and therefore that legal conclusion need not be pleaded.

That the respondent in this particular case tendered the refund of the premiums to the petitioner and has not yet had Andy Adamos's estate joined as a party, should not, we respectfully submit, affect the principles of law applicable to such cases as this generally. Even if we tendered the premiums back to the wrong party, that

would not terminate the right of Andy Adamos's estate to the money to which it is lawfully entitled. Legally, therefore, there still remains a third party, namely, Andy Adamos's estate, which has an interest to the extent of $1,184.36 in the subject matter in dispute.

Whether joined in this particular case or not, the question remains whether there is not a party other than the beneficiary designated in the policy and the insurance company, who has an interest in the subject matter of a suit on a policy of life insurance alleged to have been procured by fraud. The answer to this question is clear. Unless the premiums have been paid by the beneficiary, someone else has the right to collect the premiums which must be refunded if the policy is to be rescinded because of fraud in its procurement. Since this third party cannot be joined in an action at law brought by the beneficiary to recover the face amount of the policy, a judgment in favor of the insurer in the law action brought by the beneficiary will not terminate its liability fully on account of the insurance. The company will still remain liable to someone for return of the premiums. It is respectfully submitted that this case should be decided on these principles and not go off on any narrow ground because of the nonjoinder as yet of Adamos's estate. In fact, no personal representative has yet been appointed for Adamos's estate. If this Court deems it necessary, we will attempt to raise an administration upon Adamos's estate and then apply under Equity Rule 37 for the joinder of such personal representative, or otherwise endeavor to have some representative for Adamos's estate joined to this suit. It seems, however, that the respondent alone is taking the risk by not having a necessary party joined. The applicable principles of law are not affected. There is still the same need to have a third party brought into the litigation in order that the respondent be fully dis-

charged of all liability growing out of the insurance issued on the life of Andy Adamos. From a legal standpoint, it is still true that the petitioner is not the only person having an interest in the subject matter of the litigation and a judgment in favor of the respondent on its defense in the lawsuit will not completely terminate its liability.

That equity has jurisdiction where all of the parties necessary to a complete disposition of the controversy are not and cannot be joined at law is shown by *Morgan v. Beloit,* 7 Wall. 613, 618.

For the reasons, then, that the criterion is different in equity from that at law for determining whether such fraud exists as will entitle the victim to relief and that the beneficiary designated in the policy is not the only other party besides the insurer who is interested in the subject matter and therefore necessary to a complete disposition of the controversy, it is respectfully submitted that the remedy at law in such cases as the pending one is not adequate or complete and that for this reason the construction placed by the courts below upon Section 274(b) of the Judicial Code is correct.

The construction of Section 274(b) of the Judicial Code adopted by the lower courts is also supported by the elementary proposition that fraud is one of the best recognized sources of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; 1 *Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

If any authority is desired for the doctrine that the remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction, it is to be found in *Boyce v. Grundy,* 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

Sound Policy Supports the Decisions Below.

The third reason for construing the statute as below is that thereby a much needed improvement in the application of the law to the facts in civil cases will result. The caliber of juries is such that an insurance company, we believe, does not get a fair and impartial verdict based upon the evidence. The sympathy and prejudice of our juries almost invariably result in a verdict for the beneficiary against the company, regardless of the evidence. The petitioner, we submit, received a fair disposition of the question of fraud in this case. That beneficiaries generally will receive a fair hearing in equity in such cases is evidenced by the case of *New York Life Ins. Co. v Halpern,* 57 F. (2d) 200, affirmed in 61 F. (2d) 1037, cited by the petitioner.

Section 274(b) Is Constitutional.

If, then, the construction placed upon Section 274(b) of the Judicial Code by the decisions below in this case and by twelve Federal Judges in indistinguishable other cases is correct, it remains to determine whether, as so construed, that statutory enactment is constitutional.

That it is constitutional is established by the well settled fundamental doctrine that the constitutional guaranty of trial by jury does not apply to equity procedure: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in

equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

That Section 274(b) is constitutional was also decided by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

II.

There Is No Jury Question.

The petitioner, it is respectfully submitted, could not have suffered any prejudicial harm by the rulings below. What the petitioner wants, of course, is to have his case decided by a jury, but even if tried before a jury, the case should be decided by the judge alone. Where the evidence preponderates so heavily in favor of one side that the trial judge would feel conscience bound to set aside a verdict for the other side as being against the manifest weight of the evidence, it is not only his right but his duty to direct a verdict for the party in whose favor the evidence so preponderates: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333. The proof of the fraud by which the insurance in litigation was procured is so clear and overwhelming, it is submitted, that the trial judge would be bound to withdraw the case from the jury and direct a verdict for the defendant. The undisputed testimony of nine physicians, all of whom had to be brought in by the defendant by subpoena, proved that the deceased was suffering from a far advanced cancer in his abdomen for several months before applying for the insurance in litigation (R. 59-107). Less than two months before applying for the insurance, the deceased was in one hospital for said disease (R. 84-85) and between de-

livery of the second and third policies he was treated in another hospital for his cancer (R. 61). Within three months after the issuance of the policies, death occurred from the aforesaid cancer (R. 226). None of this highly material medical history was revealed by Adamos when applying for the insurance (R. 48-49).

It should also be noted that until his death, Adamos represented to the Jones & Laughlin Steel Corporation, his former employer, that he was totally disabled due to the accident in 1926, thereby collecting from that company workmen's compensation for total disability until his death (R. 108-112).

A few observations in answer to the petitioner's argument on the question of fraud follow. It was the plaintiff's counsel who used the language "ignorant, dumb foreigner" (R. 70). Dr. Davison talked to Adamos in English (R. 98-99), and so did Dr. Ketterer (R. 105). No persuasion was required to induce the deceased to accept the four policies aggregating $20,000 (R. 130). The medical examiner who testified that Adamos understood the questions and that his answers are correctly recorded above his signature was not connected with the defendant at the time of the trial (R. 47). He was a reputable physician (R. 47).

The two policies last issued, and perhaps the first two also, are, furthermore, vitiated because of the nondisclosure of pertinent information when they were delivered. In *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, this Court held that an applicant for insurance must inform the insurer when delivery of a policy is tendered to him of any pertinent facts bearing on his health which have occurred between the date of his medical examination and delivery of the policy. Adamos, on account of his cancer, had been confined and

treated in a hospital and had been attended by at least four doctors between the medical examination for and delivery of the last two policies (R. 60-61, 100, 102-103, 106). None of these facts was disclosed by Adamos when the policies were delivered to him (R. 127).

The last two policies, and perhaps the first two also, are void for the additional reason that the express condition precedent to their going into effect was broken. The written provision in the policies that they should not take effect if the applicant consulted or was treated by any physician between the date of his medical examination and the delivery of the policy was unquestionably violated. Such a provision constitutes a condition precedent which is valid and will be enforced: *Bostick v. New York Life Insurance Co.*, 284 Fed. 256; *MacKelvie v. Mutual Benefit Life Insurance Co.*, 287 Fed. 660; *New York Life Insurance Co. v. Horton*, 9 F. (2d) 320; *Aetna Life Insurance Co. v. Johnson*, 13 F. (2d) 824; *Mutual Life Insurance Co. v. Tabb*, 49 F. (2d) 1019; *Subar v. New York Life Insurance Co.*, 60 F. (2d) 239; *Gill v. Mutual Life Insurance Co.*, 63 F. (2d) 967.

Since, therefore, the petitioner's case would not reach the jury even if tried before one, the petitioner has not been deprived of a trial by jury and has suffered no prejudicial harm.

So far as the legibility of the photostatic copy of the application which is attached to each policy is concerned, it is to be noted that its legibility was not questioned at the hearing and that upon the petition for a rehearing the District Court stated, "We have had no trouble in reading it, and do not think the applicant would" (R. 241).

In conclusion, it is respectfully submitted that all four policies were procured by material misrepresenta-

tion and fraud, that at least the last two policies are also vitiated by reason of the non-disclosure of pertinent information when those policies were delivered and by reason, further, of a breach of an express condition precedent, that the procedure followed by the District Court and approved by the Circuit Court of Appeals is supported by precedent, is required by the relevant legal principles and is needed for the improvement of the administration of justice in civil cases, and that in any event the petitioner has suffered no prejudicial harm. Accordingly, the decree appealed from should be affirmed.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

APPENDIX.

Section 274(b) of the Judicial Code (28 U. S. C. A. § 398):

Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

SUPREME COURT OF THE UNITED STATES.

No. 452.—October Term, 1934.

George A. Adamos, Petitioner,
vs.
New York Life Insurance Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 7, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner brought this action at law as beneficiary of several policies of insurance issued by respondent. The policies were alleged to have been issued in April, 1932, upon the life of petitioner's father who died in July, 1932. The policies were to be incontestable after two years from date of issue. The action was brought in a state court in Pennsylvania and was removed to the federal court in February, 1933. Respondent's affidavit of defense set up as new matter that the insured had made false answers and declarations in his application with respect to a surgical operation he had undergone and to the treatment he had received by physicians and at hospitals; that the insured knew that these answers and declarations were false and that they had been made by the insured "fraudulently with the intent of deceiving the defendant into issuing to him the policies of insurance in litigation, when the facts were such that if he had answered said questions truthfully and had made a full and honest disclosure, the defendant would not have issued any of said policies but would have declined his application". Respondent tendered judgment for the amount of the premiums received by it, with interest, and prayed that the policies be cancelled. Petitioner replied, denying the allegations of fraud.

Respondent asked that the equitable issue raised by its affidavit of defense should be heard under Section 274b of the Judicial Code (28 U. S. C. 398) "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues". The application was granted over petitioner's objection,

and the issue of fraud was tried in equity. The District Judge decided that it was "a very plain case of fraud upon the insurance company", that the insured had "falsely answered the questions as to his medical history", and that "these questions were all as to matters of fact within his knowledge". 5 F. Supp. 278, 280, 1019.

Decree was entered cancelling the policies and providing for the repayment of the premiums tendered. The decree was affirmed by the Circuit Court of Appeals (71 F. (2d) 997) and this Court granted certiorari, November 12, 1934.

What we have said in *Enelow* v. *New York Life Insurance Company*, decided this day, is directly applicable here. The issue of fraud raised by respondent's affidavit of defense was fully available in the action at law and the court erred in directing the trial of that issue in equity.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to vacate its decree and to proceed with the trial of the action at law.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.